AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

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ANIMAL WELFARE ACT

COURT DECISIONS

ANIMAL LEGAL DEFENSE FUND v. VISLACK.
No. 14-1462 (CKK).
Court Opinion.
Filed March 14, 2016.

AWA – APA – Administrative procedure – *Chevron* deference – Issue, definition of– License renewal – Regulatory scheme – Renew, definition of.

[Cite as: No. 14-1462 (CKK), 2016 WL 1048761 (D.C. Cir. 2016)].

The Court granted Defendants' Motion to Dismiss Supplemental Complaint, holding that the agency's renewal of Cricket Hollow Zoo's license did not violate the Animal Welfare Act. In so holding, the Court found that the structure of the Act does not unambiguously require licensees to demonstrate compliance with the Act in order to have their licenses renewed. The Court further ruled that the agency's interpretation of the Act's statutory requirements was permissible and concluded that the agency's renewal decision was neither arbitrary nor capricious. The case was dismissed in its entirety.

United States District Court,
District of Columbia.

MEMORANDUM OPINION

COLLEEN KOLLAR-KOTELLY, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

In this case, Plaintiffs Animal Legal Defense Fund, Tracey Kuehl, and Lisa Kuehl challenge the United States Department of Agriculture's 2015 renewal of the license for the operation of the Cricket Hollow Zoo. The Cricket Hollow Zoo is a private zoo in Manchester, Iowa, which includes lions, tigers, bears, baboons, lemurs, dogs, rabbits, and pigs. Plaintiffs claim that the 2015 renewal was unlawful under the Animal Welfare Act, 7 U.S.C. § 2131-59, the federal statute governing such facilities, and that the agency acted in a manner that was arbitrary and capricious, an abuse of discretion, and otherwise unlawful in violation of the Administrative Procedure Act ("APA"). Plaintiffs also claim that the agency's "pattern and practice" of renewing the license for this facility, at times when the facility was in violation of the substantive standards of

the Animal Welfare Act, violates both the Animal Welfare Act and the APA.[1] Now before the Court is Defendants' [37] Motion to Dismiss Supplemental Complaint.

Upon consideration of the pleadings,[2] the relevant legal authorities, and the record for purposes of this motion, the Court GRANTS Defendants' [37] Motion to Dismiss Supplemental Complaint. Essentially, this case turns on whether the agency's interpretation of the Animal Welfare Act through the regulations that it has issued constitutes a permissible interpretation of the statutory framework. Because the Court concludes that those regulations do constitute a permissible interpretation, and because the licenses were lawfully renewed pursuant to those regulations, Plaintiffs cannot prevail on any of their claims. This case is dismissed in its entirety.

I. BACKGROUND

For the purposes of the motion before the Court, the Court accepts as true the well-pleaded allegations in Plaintiffs' Supplemental Complaint. The Court does "not accept as true, however, the plaintiff's legal conclusions or inferences that are unsupported by the facts alleged." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C.Cir.2014). The Court reserves further additional presentation of the background, as necessary, for the discussion of the legal issues below.

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[1] Plaintiffs originally challenged the 2014 license renewal in this action. In filing their Supplemental Complaint, ECF No. 35, on July 17, 2015, Plaintiffs replaced their challenge to the 2014 renewal with their challenge to the 2015 license renewal.

[2] The Court's consideration has focused on the following documents:

- Pls.' Supplemental Complaint for Declaratory and Injunctive Relief ("Compl."), ECF No. 35;
- Defs.' Mot. to Dismiss Supplemental Complaint ("Defs.' Mot."), ECF No. 37;
- Pls.' Opp'n to Defs.' Mot. to Dismiss ("Pls.' Opp'n"), ECF No. 38; and
- Defs.' Reply in Supp. of Mot. to Dismiss Supplemental Compl. ("Defs.' Reply"), ECF No. 43.

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

- Pls.' Opp'n to Defs.' Mot. to Dismiss ("Pls.' Opp'n"), ECF No. 38; and [sic]

A. Statutory and Regulatory Framework

Under the Animal Welfare Act, a license is required in order for "dealers" or "exhibitors" to operate.[3] Specifically, under the Act,

> [n]o dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, *unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked*.

7 U.S.C.A. § 2134 (emphasis added). Accordingly, the statute authorizes the Secretary of Agriculture to issue licenses for "dealers" and "exhibitors" under certain conditions:

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[3] Under the statute, a "dealer" is defined as follows:

> The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes. Such term does not include a retail pet store (other than a retail pet store which sells any animals to a research facility, an exhibitor, or another dealer).

7 U.S.C. § 2132(g). An "exhibitor" is defined as follows:

> The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

Id. § 2132(h).

> The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided,* That *no such license shall be issued* until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.]

7 U.S.C. § 2133 (emphasis added). As referenced in this provision, section 2143 includes various substantive requirements for the "humane handling, care, treatment, and transportation of animals." 7 U.S.C. § 2143 (section title).

The Animal Welfare Act also includes several provisions directed at enforcement by the agency. *First*, if the Secretary has "reason to believe" that a licensee "has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days." *Id.* § 2149(a). *Second*, "after notice and opportunity for hearing," the Secretary "may *suspend* [a license] for such additional period as he may specify, or *revoke* such license, if such violation is determined to have occurred." *Id.* (emphasis added). *Third*, the Secretary may assess civil penalties for violations of the statute. *Id*. § 2149(b). And *fourth*, the statute authorizes criminal penalties for knowing violations of the statutory provisions. *Id.* § 2149(d). Any person subject to an order of the Secretary, including license suspensions, license revocations, and civil penalties, may appeal such an order to the appropriate United States Court of Appeals. *Id.* § 2149(c).

In addition, the statute authorizes the Secretary of Agriculture "to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of" the statute." 7 U.S.C. § 2151. Indeed, "[p]ursuant to this section, USDA has adopted comprehensive renewal regulations that combine purely administrative requirements, random inspections, and discretionary enforcement proceedings." *Animal Legal Defense Fund v. U.S. Dep't of Agric*., 789 F.3d 1206, 1211 (11th Cir.2015).

In *Animal Legal Defense Fund*, the Eleventh Circuit Court of Appeals cogently described the regulatory requirements for licensing and renewals:

> On or before the expiration date of his or her one-year license, an exhibitor must submit a completed application form to the appropriate USDA regional office fulfilling three, purely administrative criteria. [1] First, the exhibitor certifies by signing the application form that, to the best of her knowledge or belief, she is compliant and will continue to comply with all AWA animal wildlife standards. [2] Second, the exhibitor pays an annual fee calculated according to USDA's fee schedule that varies according to the number of animals owned, held, or exhibited. [3] Third, the exhibitor submits an annual report detailing the number of animals owned, held, or exhibited. So long as an exhibitor meets these three criteria, even if her facility fails to comply with animal wildlife standards on the license expiration date, USDA must grant her a renewal. ... Otherwise, the license automatically terminates due to expiration.

Animal Legal Defense Fund, 789 F.3d at 1211 (citations omitted). The regulations also elaborate on the statutory scheme for enforcement, including provisions for random inspections by USDA officials and a process for suspending or revoking licenses, as well for levying civil penalties. *See id.* at 1212. Notably, any suspension longer than 21 days, license revocations, and civil penalties require notice and a hearing. *Id.*; *see also* 9 C.F.R. § 2.12.

B. Factual and Procedural Background

Tom and Pamela Sellner initially obtained a license for the Cricket Hollow Zoo on May 27, 1994. Compl. ¶ 14. The USDA has renewed their license each year since then. *Id.* Plaintiffs allege that the USDA has issued numerous notices of violation with respect to the Zoo, including several associated fines, in the years since 2004. *See id.* ¶¶ 105-119. Plaintiffs further allege that, upon information and belief, the USDA

renewed the license in late April 2015 or in May 2015. *Id.* ¶ 125. The Administrative Record reflects that the license is currently set to expire, if not renewed, on May 27, 2016, pursuant to the 2015-2016 license certificate. *See* Pls.' Opp'n, Ex. A at 8 (certified list of contents of administrative record); *id.* at 11 (2015-2016 certificate).

Plaintiffs initially brought this action challenging the 2014 renewal of the Cricket Hollow Zoo license, as well as the alleged pattern and practice of unlawful license renewals. After the Court resolved the parties' disputes regarding the necessity of producing the administrative record at this stage of the proceedings and regarding the scope of the administrative record,[4] the Court granted leave for Plaintiffs to file a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d). *See* Minute Order dated July 17, 2015. Defendants' motion to dismiss that supplemental complaint is now before the Court.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint on the grounds that it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Rather, a complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. In deciding a Rule 12(b)(6) motion, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," or "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Ward v.*

[4] The details of those disputes are not material to the motion before the Court today.

District of Columbia Dep't of Youth Rehab. Servs., 768 F.Supp.2d 117, 119 (D.D.C.2011) (citations omitted).

III. DISCUSSION

Plaintiffs claim that the agency's 2015 licensing decision is unlawful under the Animal Welfare Act and, therefore, must be set aside under the APA. Plaintiffs also claim that the decision was arbitrary and capricious and an abuse of discretion. The Court addresses the parties' arguments about the lawfulness of the decision under the Animal Welfare Act, followed by Plaintiffs' claims that the decision was otherwise arbitrary and capricious or an abuse of discretion. Because the Court concludes that none of Plaintiffs' claims are viable in light of the applicable statutory provisions and the regulations promulgated, the Court need not address the parties' arguments regarding the viability of a "pattern and practice" claim under the APA.

A. Lawfulness of the Regulatory Scheme under the Animal Welfare Act

To assess Plaintiffs' claim that the 2015 renewal of the Cricket Hollow Zoo's license must be set aside as unlawful under the APA, *see* 5 U.S.C. § 706(2), the Court must turn to USDA's interpretation of the statutory scheme. The Court applies the framework established in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court first asks "whether Congress has directly spoken to the precise question at issue, in which case we must give effect to the unambiguously expressed intent of Congress." *Deppenbrook v. Pension Benefit Guar. Corp*, 778 F.3d 166, 172 (D.C.Cir.2015) (citation omitted). "If the statute is silent or ambiguous with respect to the specific issue, however, we move to the second step and defer to the agency's interpretation as long as it is based on a permissible construction of the statute." *Id.* "To trigger deference," an agency must show that Congress has " 'delegated authority to the agency generally to make rules carrying the force of law' " and that " 'the agency interpretation claiming deference was promulgated in the exercise of that authority.' " *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C.Cir.2014) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)).

The question before the Court is narrow: whether the regulatory scheme pursuant to which the license was issued is lawful under the Animal Welfare Act, not whether Congress has chosen the *best* statutory scheme or whether the agency has implemented that scheme through the *best* set of regulations. *See Ark Initiative v. Tidwell*, No. 14–5259, 2016 WL 874773, at *5 (D.C.Cir. Mar. 8, 2016) ("The question before us is of a type ubiquitous to administrative law: Whether the Colorado rule is permissible under federal law, not whether we believe as a matter of environmental policy it is the best rule, or even a good one."). With that in mind, the Court proceeds to *Chevron*'s two steps.

1. *Chevron* Step One

"Under step one, the court must determine 'whether Congress has directly spoken to the precise question at issue.' " *W. Minnesota Mun. Power Agency v. Fed. Energy Regulatory Comm'n*, 806 F.3d 588, 591 (D.C.Cir.2015) (quoting *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778). "If so, then the court and the agency must 'give effect to the unambiguously expressed intent of Congress.' " *Id.* (quoting *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). The precise question at issue in this case is whether the agency permissibly renewed the license of the Cricket Hollow Zoo even if, as Plaintiffs allege, the agency knew that the Zoo did not then comply with the substantive standards of the Animal Welfare Act regarding "the human handling, care, treatment, and transportation of animals." 7 U.S.C. § 2143(a).

"In addressing a question of statutory interpretation, the court begins with the text." *W. Minnesota Mun. Power Agency*, 806 F.3d at 591. As presented above, the following provision of the statute governs the issuance of licenses to "dealers" and "exhibitors":

> The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided,* That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary

> pursuant to section 2143 of this title[.]

7 U.S.C. § 2133.

Plaintiffs argue that the plain language of the statute requires that no license can be issued *or renewed* until the applicant has "demonstrated that his facilities comply with the standards promulgated by the Secretary." *Id.* As support for their argument, Plaintiffs rely primarily on several dictionary definitions of the relevant statutory language, on other provisions of the statutory scheme, and on their assessment of the agency's implementation of the regulatory scheme. Specifically, Plaintiffs assert that the *renewal* of a license, which is an administrative process that occurs annually under the agency's regulatory scheme, is encompassed within the statutory prohibition on *issuing licenses* until certain requirements are met. Plaintiffs' *Chevron* Step One argument rises or falls with this claim. That is, if license renewal is a type of license issuance, then demonstration of compliance with the statute's substantive requirements would be necessary for license renewal; however, if license renewal is a distinct activity, which is not a type of license issuance, the statute does not require the demonstration of compliance with its substantive standards in order for a license to be renewed.

By contrast, Defendants argue that Congress has not spoken to the question of renewals and that, therefore, this question must be resolved under *Chevron* Step Two. Specifically, Defendants argue that none of Plaintiffs' arguments as to why the statute is *unambiguous* are persuasive. They also argue that the language of the statute, together with the relevant context, mandates the conclusion that Congress has not spoken to the precise question at issue.

Before assessing the parties' specific arguments, the Court notes an elementary proposition. Plaintiffs repeatedly assert in a conclusory fashion that a "renewal license" is a type of license and that *renewing* a license is a form of *issuing* a license. However, those conclusory characterizations are not sufficient to support any legal conclusions regarding renewals. With that in mind, the Court first turns to the text of the statute, followed by the other arguments of the parties.

As described by the Eleventh Circuit Court of Appeals in its consideration of the same issue that is before this Court today, the term "issue" is not defined in the Animal Welfare Act and the term "renew" is not even found within the statute. Looking to a 1976 dictionary because of the relative closeness in time of its publication to the 1966 enactment of the Animal Welfare Act, the Eleventh Circuit Court of Appeals described the term "issue" as follows: " 'Issue' is defined, in the sense linguistically relevant to the circumstances here, as 'to come out, go out,' 'to proceed or come forth from a usually specified source,' or 'to cause to appear or become available by officially putting forth or distributing or granting or proclaiming or promulgating.' " *Animal Legal Defense Fund*, 789 F.3d at 1216 (quoting WEBSTER's NEW INTERNATIONAL DICTIONARY 1201 (3d ed. 1976)). With reference to the same dictionary, the Eleventh Circuit described the term "renew" as follows: " 'Renew' means 'to make new again,' 'to restore to fullness or sufficiency,' or 'to grant or obtain an extension of.' " *Id.* (quoting WEBSTER's at 1922). The Eleventh Circuit assessed the relationship of these terms as follows:

> Comparing these two definitions, we conclude the plain meaning of "issue" does not necessarily include "renew." Rather than make a license "come out" or "go out," one could "restore to fullness" a license that has already "come out" or "gone out." In fact, that is precisely the type of licensing regime USDA has established under the AWA. USDA makes a license "go out" once an applicant has met the requirements for an issuance. After USDA makes the license go out, it remains "valid and effective" unless the licensee fails to comply with the administrative renewal process. *See* 9 C.F.R. § 2.5(a) (stating a "license issued under this part shall be valid and effective" unless "revoked or suspended pursuant to section 19 of the Act"). No license is given out during the renewal process; instead, the exhibitor maintains the same license number. Based on our analysis of § 2133 standing alone, we cannot conclude Congress has spoken to the precise question at issue.

Id. The Court agrees with this assessment: the statutory language does not compel the conclusion that "issue" necessarily includes "renew."

Plaintiffs' reliance on what appears to be the Ninth Edition of Black's Law Dictionary is of no more assistance to their argument. With respect to the term "issue," Plaintiffs cite the definition "[t]o send out or distribute officially." Pls.' Opp'n at 15 (quoting BLACK'S LAW DICTIONARY 908 (9th Ed. 1990)). Plaintiffs rely on that definition to argue that the agency "issues" a license each time it sends out a piece of paper renewing the license. However, Plaintiffs wholly ignore an additional definition of the term "issue" from that same dictionary: "[t]o be put forth officially." BLACK'S LAW DICTIONARY 908. Indeed, it is that second definition that appears to be a more plausible reading of the statutory text: that *permission* cannot be given for a zoo to operate until an applicant demonstrates compliance with the substantive standards of the act—not that compliance is required before the agency entrusts a piece of paper to the United States Postal Service for delivery. But ultimately which dictionary definition appears to be a closer fit to this Court is of no moment because Plaintiffs cannot generate precision in the statutory text by referencing selected definitions from their own preferred dictionary.[5] Simply put, the statutory text itself never discusses renewals, and the Court concludes that the text does not allow the determination that Congress has spoken to the precise question at issue: whether *renewals* are within the ambit of the statutory reference to the *issuance* of licenses.

The context of the statute also confirms that Congress has not spoken to the precise question at issue. The Court agrees with the Eleventh Circuit Court of Appeals that "[e]xamination of the whole AWA statute strengthens USDA's argument that Congress did not unambiguously require compliance with animal welfare standards on the date of license

[5] Nor is Plaintiffs' reference to the definitional section of the APA persuasive. Under the APA, it is true that a licensing process is defined to include an "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. § 551(9). However, that inclusive definition of the term licensing process, for the purpose of subjecting the final outcome of those processes to judicial review, in no way suggests that the "renewal" of a license is wholly encompassed with the "issuance" of a license.

renewal." *Animal Legal Defense Fund*, 789 F.3d at 1216. The Eleventh Circuit found the separate enforcement provisions under section 2149 of the statute to be important, as does this Court. Specifically, that section "spells out the adjudicative process for punishing a licensee, *i.e.*, one who already holds a license." *Id.* (citation omitted). If the provision of the statute regarding the issuance of licenses "mandated the revocation of a license whenever USDA thinks the exhibitor has failed to demonstrate compliance on an anniversary date, the due process protections afforded to licensees in § 2149 would be mere surplusage." *Id.* (citation omitted). The Eleventh Circuit further explained why the enforcement provision was inconsistent with the allegedly clear intent of Congress to include renewals within the scope of the license issuance provisions:

> To revoke a license, USDA would not need to bring an enforcement proceeding against a licensee; the agency could patiently bide its time until the license anniversary rolled around, then immediately revoke the license for failure to demonstrate compliance. The exhibitor would have no right to a hearing, nor would she have a right to appeal the denial of her renewal application. In light of the protracted time often necessary to litigate a final agency decision through an appeal, USDA would have no reason to initiate any enforcement proceedings against licensees. Surely Congress did not enact § 2149 to lull licensees into relying on due process protections that do not actually exist.

Id. The Court finds this analysis persuasive and concludes that the structure of the Animal Welfare Act does not *unambiguously* require existing licensees to demonstrate compliance with the Act's substantive provisions in order for their license to be renewed.[6] Because the Court

[6] Citing the provision of section 2153 that authorizes the agency to "collect[ ] reasonable fees for licenses issued," 7 U.S.C. § 2153, Plaintiffs argue that the fact that agency levies fees on license renewals suggests that the *agency* understands renewals to be within the scope of license issuances. Even assuming that the agency's practice could create statutory precision where none otherwise exists, the Court disagrees. This provision nowhere suggests that the agency can only levy fees on a licensee at the moment of the issuance of a license. Therefore, to assess fees on a yearly basis, on the occasion of a license renewal, in no way indicates that a license renewal is in effect the issuance of a new license.

concludes that both the text and the context of the statute indicate that the statute does not speak to the question at issue, the Court sees no need to consult the statute's legislative history in order to determine whether to proceed to *Chevron* Step Two.[7]

Moreover, the remainder of Plaintiffs' *Chevron* Step One arguments do not fare any better. Plaintiffs rely on the decision of the District of Columbia Circuit Court of Appeals in *Natural Resources Defense Council v. EPA*, 777 F.3d 456 (D.C.Cir.2014), for the proposition that the agency may not eliminate certain statutory requirements. *Id.* at 471. But that case says nothing about whether the Animal Welfare Act speaks precisely to the question at issue in this case. Similarly, the Supreme Court's conclusion in *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), that the language of the Clear Air Act meant that greenhouse gases were within the scope of that statute is inapposite. That case does not stand for the broad proposition for which Plaintiffs cite it. Rather, the Supreme Court in *Massachusetts v. EPA* conducted a thorough analysis of the particular provisions of that statute and concluded that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' ... EPA has the statutory authority to regulate the emission of such gases from new motor vehicles." *Id.* at 532, 127 S.Ct. 1438. The Supreme Court's decision in *Massachusetts v. EPA* provides no basis for the Court to conclude that the Animal Welfare Act *unambiguously* includes renewals within the scope of the requirements governing the issuance of licenses. So too, the D.C. Circuit Court of Appeals' decision in *Western Minnesota Municipal Power Agency v. Federal Energy Regulatory Commission* is not to the contrary. 806 F.3d at 591. There the Court of Appeals determined that the agency exceeded the scope of its authority in imputing a limitation to a statutory term that was not present in the statutory text. *See id.* at 596.

[7] Citing the provision of section 2153 that authorizes the agency to "collect[ ] reasonable fees for licenses issued," 7 U.S.C. § 2153, Plaintiffs argue that the fact that agency levies fees on license renewals suggests that the *agency* understands renewals to be within the scope of license issuances. Even assuming that the agency's practice could create statutory precision where none otherwise exists, the Court disagrees. This provision nowhere suggests that the agency can only levy fees on a licensee at the moment of the issuance of a license. Therefore, to assess fees on a yearly basis, on the occasion of a license renewal, in no way indicates that a license renewal is in effect the issuance of a new license.

But the agency here, the USDA, has not taken a similar step; instead, it has concluded that the statute does not speak to renewals and that renewals are not an activity encompassed within the meaning of issuing licenses. The *Western Minnesota* case did not raise such an issue. The USDA has not, contrary to Plaintiffs' assertions, isolated a certain subset of license issuances and determined that the statutory requirements simply do not apply to them. Accordingly, *Western Minnesota* is inapposite with respect to the case at hand. Finally, the regulations promulgated by the agency simply do not reveal a fixed meaning to the statute that a straightforward reading of the statutory text, the context, and even the legislative history otherwise fail to divulge.

Having assessed the several arguments of the parties regarding the statute, the Court concludes that, as Defendants argue, Congress has not spoken to the question at issue. Therefore, the Court proceeds to analyze the statutory provisions under *Chevron* Step Two.

2. *Chevron* Step Two

Under *Chevron* Step Two, the question for the Court is "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. As with Step One, the Court is once again persuaded by the thorough analysis of the Eleventh Circuit Court of Appeals in *Animal Legal Defense Fund*. "Because Congress has expressly delegated authority to USDA to elucidate the meaning of 7 U.S.C. § 2133 through regulation, those regulations 'are given controlling weight unless arbitrary, capricious, or manifestly contrary to the statute.' " *Animal Legal Defense Fund*, 789 F.3d at 1220 (quoting *Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778). "If USDA's construction of the statute is reasonable in light of the policies committed to its care by the [Animal Welfare Act], this Court may not substitute its own construction of the statutory provision." *Id.* (citation omitted). Instead, the Court's "duty is to decide whether USDA's construction is a reasonable one in light of the statutory scheme." *Id.*; *see also Ark Initiative*, 2016 WL 874773, at *5. Upon review of the parties' arguments, the Court concludes that the agency's construction is a reasonable one.

Before considering the reasonableness of the agency's interpretation,

the Court addresses several prefatory arguments. First, Plaintiffs assert that the agency's position does not warrant deference because it is merely a "post hoc litigation position." *See* Pls.' Opp'n at 23. However, Plaintiffs do not develop this argument fully and instead gesture towards the briefing before the Eleventh Circuit in *Animal Legal Defense Fund*. In any event, the Court agrees with the Eleventh Circuit that the agency's interpretation is not a post-hoc rationalization. *See Animal Legal Defense Fund*, 789 F.3d at 1221–23. Most importantly, "USDA first articulated its license renewal policy not during this litigation, but in 1967." *Id.* at 1221 (citing Laboratory Animal Welfare, 32 Fed. Reg. 3720, 3721, §§ 2.4–2.5 (Feb. 24, 1967)). It is in the regulations issued that year that the agency "set[ ] independent requirements for license issuance versus renewal." *Id.* Regardless of any minor discrepancies in the agency's reasoning offered over the years, "this is not a case where the agency's position is 'wholly unsupported by regulations, rulings, or administrative practice.' " *Id.* at 1221–22 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)). Accordingly, the "agency's statutory interpretation embodied in notice-and-comment rulemaking for nearly fifty years" warrants deference. *Id.* at 1222. Furthermore, the Court concludes, as did the Eleventh Circuit, that the alleged inconsistencies that Plaintiffs identified in the *Animal Legal Defense Fund* appeal before that court do not detract from the deference owed to the agency's reasoned and longstanding interpretation. *See id.*

Having established that the agency's interpretation is entitled to deference, the Court proceeds to assess the reasonableness of the agency's interpretation itself. Specifically, the Court considers whether the agency's interpretation of the statute through the regulatory scheme it promulgated is reasonable in light of the fact that the scheme does not condition renewal of a facility license on demonstration of compliance with the standards of the Animal Welfare Act. The Court concludes that it is reasonable.

The administrative renewal process established by the USDA requires a licensee to submit an application for renewal complying with three requirements:

1. Applicant must "certify[y] by signing the application

> form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards." 9 C.F.R. § 2.2(b).
>
> 2. The applicant must pay the annual license fee. *Id.* § 2.2(c).
>
> 3. The applicant must submit an annual report to the agency. *Id.* § 2.7. The required contents of the annual report vary by the category of applicants, such as whether the applicant is a "dealer" or an "exhibitor." *See id.*

See Rules and Regulations, Department of Agriculture, Animal Welfare; Licensing and Records, 60 Fed. Reg. 13893–01, 13894 (Mar. 15, 1995) (establishing renewal requirements). Unlike the initial application process for a license, the renewal process does not require an applicant to demonstrate compliance with the substantive standards of the Animal Welfare Act. *See Animal Legal Defense Fund*, 789 F.3d at 1223 (citing 9 C.F.R. §§ 2.2(b), 2.3(b)). In addition to the renewal process itself, licensees are subject to random inspections. 9 C.F.R. § 2.3. Finally, as described above, the agency may bring enforcement proceedings against a licensee, through which the agency may seek to suspend or revoke a license or to levy civil penalties. *See* 7 U.S.C § 2149; 9 C.F.R. § 2.5.

The Court concludes, as did the Eleventh Circuit in *Animal Legal Defense Fund*, that the agency's interpretation of the statutory requirements as embodied in this regulatory scheme is permissible. The Eleventh Circuit's analysis is cogent and persuasive and, therefore, worth quoting at some length:

> USDA's construction of the AWA's license renewal process was "a reasonable policy choice for the agency to make." *Chevron,* 467 U.S. at 845, 104 S.Ct. 2778. USDA's administrative renewal scheme furthers the AWA's competing goals of promoting animal welfare and affording due process to licensees. Purely administrative renewal keeps USDA's records up-to-

> date, and then allows the agency to protect animal welfare through random, unannounced inspections. Given its limited resources, USDA could not annually inspect the facilities of every zoo, aquarium or other exhibitor across the country, or initiate license termination proceedings for every violation, no matter how minor. USDA has exercised its "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *See Massachusetts v. EPA,* 549 U.S. 497, 527, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). At the same time, the exclusive use of enforcement proceedings to suspend or revoke licenses for noncompliance fosters Congress's intent to protect licensees from arbitrary agency action, as codified at 7 U.S.C. § 2149. USDA's interpretation restrains the agency from using the renewal process as a means to bypass licensees' right to notice, a hearing, and an appeal.

Animal Legal Def. Fund, 789 F.3d at 1224 (footnote omitted). This Court agrees that it is reasonable for the agency to establish a two-prong system through the regulations it promulgated under the Animal Welfare Act. That is, after an applicant for a license initially demonstrates compliance with the substantive requirements of the statute, as required by the statute itself, a license can be renewed through a purely administrative process. However, the agency retains the authority to initiate enforcement proceedings, through which licensees are afforded the due process protections required by Congress. *See, e.g.*, 7 U.S.C. § 2149 (establishing notice and hearing requirements). That scheme embodies a reasonable division of tasks, reasonably fulfills the various requirements of the statute, and is based on a permissible construction of the statute.

Plaintiffs submit two primary arguments in response: that the agency's interpretation is contrary to Congressional intent and that the interpretation produces absurd results. The Court disagrees on both fronts. First, Plaintiffs argue that the regulatory scheme adopted by the agency is contrary to Congress's intent to "insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment." 7 U.S.C. § 2131. Plaintiffs

contend that this goal is the sole purpose of the statute and that, therefore, the agency's decision *not* to require licensees to demonstrate compliance with the statute's substantive requirements each time a license is renewed is at odds with the statute's purpose. However, Plaintiffs ignore the fact that an additional goal of the statute is to afford due process to licensees. *See Animal Legal Defense Fund*, 789 F.3d at 1224; *see also* 7 U.S.C. § 2149(a). Accordingly, that the agency chose to accommodate the multiple goals of the statute, including the promotion of animal welfare and the protection of procedural rights afforded to applicants and licensees, is well within the agency's zone of policymaking discretion.[8]

Similarly, the Court rejects Plaintiffs' contention that the regulatory scheme established by the agency engenders absurd results. Plaintiffs claim that it is absurd that the *initial* application for a license would be rejected if an applicant has not demonstrated compliance with the statute's substantive requirements, but that a licensee who no longer complies with the substantive requirements can retain that license indefinitely, as long as that licensee continues to satisfy the requirements of the administrative renewal process and absent an enforcement proceeding. The Court disagrees. That discrepancy simply reflects the agency's reasoned policy choice that, once an applicant has initially demonstrated compliance with the requirements of the statute, as required by the text of the statute, a license is not automatically revoked for noncompliance. That is, a license is not revoked absent an enforcement proceeding initiated by the agency pursuant to the strictures of the statutory provisions enacted by Congress. To do so is not absurd; rather, it is a reasonable interpretation and implementation of the Congressional scheme. Similarly, it is not absurd that a licensee seeking a renewal would be denied that request absent payment of the renewal fee, but not as a result of noncompliance with the substantive provisions of the statute. Plaintiffs clearly disagree with the agency's choice, but that does not transform the result into an absurd one. Nor does it transform the regulatory scheme into an unreasonable one.

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[8] For that reason, *Natural Resources Defense Council v. Daley*, 209 F.3d 747 (D.C.Cir.2000), is inapposite. In that case, unlike the case before this Court, the D.C. Circuit Court of Appeals identified the relevant statute as having a single priority: the prevention of overfishing. *See id.* at 753.

The Court need not, as well as cannot, opine on whether the scheme discussed here is the regulatory scheme the Court itself would establish or whether the agency's policy choices are those that the Court would choose. Doing so is not within the scope of the Court's authority; the Court is only authorized to determine whether the scheme established by the agency is reasonable and is based on a permissible interpretation of the statute. Confronted with the same question facing this Court today, the Eleventh Circuit Court of Appeals concluded as follows: "Tasked by Congress to perform the difficult job of reconciling the inherently conflicting interests of due process and animal welfare, USDA has exercised its expertise to craft a reasonable license renewal scheme based on a permissible construction of the [Animal Welfare Act]." *Animal Legal Defense Fund*, 789 F.3d at 1225. This Court agrees. Because the Court's task is limited under the APA and under the *Chevron* doctrine, the Court need not say any more in order to conclude that the 2015 renewal of the Cricket Hollow Zoo's license was not unlawful with respect to the Animal Welfare Act.

B. Whether the Licensing Decision is Arbitrary and Capricious or an Abuse of Discretion

Plaintiffs also claim that the licensing decision is arbitrary and capricious and an abuse of discretion. However, under the regulatory framework, the agency is afforded no discretion whatsoever in implementing the renewal process. Specifically, the regulations provide that the agency "will renew a license after the applicant certifies by signing the application form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards." 9 C.F.R. § 2.2.[9] Accordingly, because there is no dispute that the applicant satisfied the enumerated administrative criteria with respect

[9] Insofar as the Plaintiffs characterize the regulatory scheme itself differently, the Court "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994). "[T]he agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Id.* (citations omitted). Here, there is no basis for Plaintiffs to disagree with, or for the Court to deviate from, the agency's interpretation of its own regulations.

to the 2015 renewal of the Cricket Hollow Zoo's license, there is no basis for the Court to conclude that the licensing decision was arbitrary and capricious or an abuse of discretion.

Finally, because Plaintiffs' claims fail with respect to the 2015 licensing decision and because the Court has concluded that the regulatory scheme embodies a permissible interpretation and a reasonable implementation of the statutory scheme, Plaintiffs' "pattern and practice" claim necessarily fails as well. Accordingly, there is no need for the Court to consider the parties' arguments regarding the viability of "pattern and practice" claims under the APA.

* * *

In sum, the Court has concluded that, because Congress has not spoken to the precise question at issue, it is necessary to evaluate the agency's regulatory scheme under *Chevron* Step Two. Doing so, the Court concludes that the regulatory scheme under which the agency renewed the license of the Cricket Hollow Zoo embodied a permissible interpretation of the relevant provisions of Animal Welfare Act. Therefore, the renewal of the Zoo's license in 2015 did not violate the provisions of the Animal Welfare Act. Moreover, because the regulatory scheme affords the agency no discretion in renewing a license once an applicant has satisfied the enumerated criteria under the regulations, the Court concludes that the agency's decision was neither arbitrary and capricious nor an abuse of discretion. For those same reasons, the Court concludes that Plaintiffs' "pattern and practice" claim fails as well.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' [37] Motion to Dismiss Supplemental Complaint. This case is dismissed in its entirety.

An appropriate Order accompanies this Memorandum Opinion.

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UNITED STATES v. HORTON.
Case No. 5:15-CV-2553.
Memorandum Opinion of Court.
Filed June 30, 2016.

AWA – Civil penalty – Inability to pay – Summary judgment.

[Cite as: No. 5:15-CV-2553, 2016 WL 3555451 (N.D. Ohio June 30, 2016)].

The Court granted Plaintiff's Motion for Summary Judgment, holding that the factual and procedural background provided by Plaintiff was unopposed and therefore undisputed. The Court found that Defendant's sole defense—a letter stating that Defendant could not afford the civil penalty that the Judicial Officer had imposed—was unsupported by the record; the Court also ruled that Defendant's inability to pay was not a valid defense. The Court further concluded that the Sixth Circuit's affirmation of the administrative decision by USDA was dispositive and that Plaintiff was entitled to judgment as a matter of law.

United States District Court,
Northern District of Ohio.

MEMORANDUM OPINION

HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Before the Court is plaintiff's motion for summary judgment. (Doc. No. 8.) Defendant, though served with the motion, has neither filed any opposition nor sought an extension of the April 15, 2016 deadline. For the reasons set forth herein, the motion is granted.

I. DISCUSSION

A. Background

The factual and procedural background set forth by plaintiff in the motion for summary judgment is unopposed and, therefore, undisputed.

On December 10, 2015, plaintiff filed this action to reduce to judgment an administrative determination and fine by the United States Department of Agriculture's ("USDA") Administrator of the Animal and Plant Health Inspection Service ("APHIS") against defendant. (Complaint & Ex. A.)

An Administrative Law Judge ("ALJ") found defendant in violation of the Animal Welfare Act ("AWA" or "the Act"), 7 U.S.C. §§ 2131–2159, for his operation of Horton's Pups, a business located in Virginia, where defendant also lived. The business is currently in Millersburg, Ohio. Between about November 9, 2006 and September 30, 2009, defendant sold dogs for use as pets to various licensed businesses. Defendant operated his business without the requisite license, although he had been timely warned against doing so by the APHIS.

Administrative proceedings were commenced against defendant. The ALJ issued an order directing defendant to cease and desist violating the Act and to pay $14,430 in civil penalties. Cross-appeals were taken, and the judicial officer ("JO") acting for the USDA adopted most of the ALJ's findings. However, the JO increased the civil penalty to $191,200. Defendant appealed to the Sixth Circuit, which affirmed the JO's decision. *See Horton v. U.S. Dep't of Agriculture*, 559 Fed.Appx. 527 (6th Cir.2014).

Plaintiff now demands judgment against defendant in the principal sum of $191,200, plus costs of suit, and such other relief as this Court may deem just.

B. Summary Judgment Standard

When a party files a motion for summary judgment, it must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record...; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

C. Analysis

Defendant has not opposed, or in any way refuted, the factual and procedural allegations. Defendant's sole defense, submitted as a letter to

the Court that the Clerk filed as an answer, is that he cannot afford the fine. There is nothing in the record to support this assertion and, on summary judgment, a party is not entitled to rely solely on the pleadings. In any event, inability to pay the civil penalty imposed under 7 U.S.C. § 2149(b) is not a valid defense. *See, e.g.*, *In re: Tracey Harrington*, AWA Docket No. 07–0036, 2007 WL 7278316 at *1 (U.S.D.A. Aug. 28, 2007) (inability to pay is not one of the statutory factors that must be considered when determining the amount of civil penalty); *In re: Marjorie Walker, d/b/a Linn Creek Kennel*, AWA Docket No. 04–0021, 2006 WL 2439003 at *22 (U.S.D.A. Aug. 10, 2006) (rejecting inability to pay as a valid basis for reducing the civil penalty).

The affirmance by the Sixth Circuit of the administrative decision by the APHIS and the USDA is case dispositive. There being no opposition offered by defendant, and the record, in fact, supporting plaintiff's position, plaintiff is entitled to judgment as a matter of law.

II. CONCLUSION

For the reasons set forth herein, this Court hereby reduces to judgment the administrative determination and fine against defendant, Lanzie Carroll Horton, Jr. Although plaintiff requested both "costs of suit[,] and such other relief ... as may [be] deemed just[,]" the Court further determines that this amorphous, unspecified, and unsupported request does not warrant any additional relief.

IT IS SO ORDERED.

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DEPARTMENTAL DECISIONS

ANIMAL WELFARE ACT

In re: LANCELOT KOLLMAN RAMOS, a/k/a LANCELOT RAMOS AND LANCELOT KOLLMAN, an individual.
Docket No. 13-0342.
Decision and Order.
Filed April 18, 2016.

AWA – Animal cargo space – Cease and desist – Dealer – Environment enhancement – Feeding – Handling – License, requirement of – Non-interference with APHIS officials – Sanctions – Veterinary care.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondent.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

I. PROCEDURAL HISTORY

On September 10, 2013, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act]; the regulations and standards issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Administrator alleges: (1) on November 7, 2008, Mr. Ramos verbally abused and harassed Animal and Plant Health Inspection Service [APHIS] inspectors, in violation of 9 C.F.R. § 2.4;[1] (2) during the period from October 19, 2009, through November 8, 2010, Mr. Ramos operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, without having been licensed by the

[1] Compl. ¶ 4 at 2.

Secretary of Agriculture, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c);[2] (3) during the period from June 1, 2008, through October 29, 2008, Mr. Ramos failed to handle an elephant as carefully as possible in a manner that did not cause the elephant behavioral stress, physical harm, or unnecessary discomfort, in violation of 9 C.F.R. § 2.131(b)(1);[3] (4) between January 10, 2008, and November 7, 2008, Mr. Ramos failed to provide adequate veterinary care to an elephant, in violation of 9 C.F.R. § 2.40(b)(2);[4] (5) on October 29, 2008, Mr. Ramos failed to provide adequate veterinary care to a tiger, in violation of 9 C.F.R. § 2.40(b)(2);[5] (6) on October 29, 2008, Mr. Ramos failed to provide adequate veterinary care to a lion, in violation of 9 C.F.R. § 2.40(b)(2);[6] (7) on October 29, 2008, Mr. Ramos failed to have a written plan for the environmental enrichment of two nonhuman primates, in violation of 9 C.F.R. §§ 2.100(a) and 3.81;[7] (8) during the period October 29, 2008, through November 7, 2008, Mr. Ramos failed to feed an elephant wholesome, palatable food free from contamination and of sufficient quantity and nutritive value to maintain the elephant in good health and failed to prepare a diet with consideration for the elephant's condition and size, in violation of 9 C.F.R. §§ 2.100(a) and 3.129;[8] (9) on September 11, 2009, Mr. Ramos failed to design and construct the animal cargo space of his primary conveyance to protect the health and ensure the safety of four tigers and two lions contained in the animal cargo space, in violation of 9 C.F.R. §§ 2.100(a) and 3.138;[9] and (10) Mr. Ramos knowingly failed to obey a cease and desist order issued by the Secretary of Agriculture on May 10, 2001.[10] On September 26, 2013, Mr. Ramos filed an answer in which Mr. Ramos denied the material allegations of the Complaint, raised affirmative defenses of laches and selective prosecution, and requested oral hearing.[11]

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[2] Compl. ¶ 5 at 2-3.
[3] Compl. ¶ 6 at 3.
[4] Compl. ¶ 7 at 3.
[5] Compl. ¶ 8 at 3-4.
[6] Compl. ¶ 9 at 4.
[7] Compl. ¶ 10 at 4.
[8] Compl. ¶ 11 at 4.
[9] Compl. ¶ 12 at 4; Notice of Correction to Complaint, filed by the Administrator on August 21, 2014.
[10] Compl. ¶ 3 at 2.
[11] Respondent, Lancelot Kollman Ramos a/k/a Lancelot Ramos a/k/a Lancelot Kollman's Answer, Affirmative Defenses and Request for Hearing [Answer].

On September 24-25, 2014, Administrative Law Judge Janice K. Bullard [ALJ] conducted a hearing by audio-visual telecommunication.[12] Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator and appeared at an audio-visual telecommunication site in Washington, DC. William J. Cook, Baker & Cook, P.A., Tampa, Florida, represented Mr. Ramos and appeared at an audio-visual telecommunication site in Palmetto, Florida. The ALJ presided over the hearing from a third audio-visual telecommunication site. Witnesses appeared at the Washington, DC, and the Palmetto, Florida, audio-visual telecommunication sites. The ALJ admitted to the record the Administrator's exhibits, identified as CX 1-CX 22, CX 25-CX 35, and CX 37-CX 53 (Tr. at 7-9, 245-46, 251, 503), and Mr. Ramos's exhibits, identified as RX 1-RX 17 (Tr. at 9-10). The parties entered into a stipulation of fact, which they memorialized in a document identified as ALJX 1 (Tr. at 12-15). The Administrator's exhibit and witness list is identified as ALJX 2,[13] Mr. Ramos's exhibit and witness list is identified as ALJX 3, and Mr. Ramos's supplemental list of witnesses and exhibits is identified as ALJX 4.

On July 14, 2015, after the parties filed post hearing briefs,[14] the ALJ issued a Decision and Order in which the ALJ: (1) found, during the period from October 19, 2009, through November 8, 2009, Mr. Ramos operated as a dealer without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c); (2) found, on September 13-14, 2008, Mr. Ramos exhibited an elephant while the elephant was in poor physical condition and health, in violation of 9 C.F.R. § 2.131(b)(1); (3) found Mr. Ramos failed to provide a timely written plan of environment enhancement to promote the psychological well-being of nonhuman primates, in violation of 9 C.F.R. § 3.81; (4) found, on September 13-14, 2008, when Mr. Ramos violated 9 C.F.R. §

[12] References to the transcript of the September 24-25, 2014, hearing are designated as "Tr." and the page number.

[13] The transcript erroneously identifies the Administrator's exhibit and witness list as ALJX 1 (Tr. at 9).

[14] On February 11, 2015, the Administrator filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof [Complainant's Post Hearing Brief] and Mr. Ramos filed Respondent, Lancelot Kollman Ramos a/k/a Lancelot Ramos a/k/a Lancelot Kollman's Post Hearing Argument.

2.131(b)(1), Mr. Ramos knowingly failed to obey a cease and desist order issued by the Secretary of Agriculture; (5) ordered Mr. Ramos to cease and desist from further violations of the Animal Welfare Act and the Regulations; and (6) assessed Mr. Ramos a $6,650 civil penalty.[15] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated the Animal Welfare Act and the Regulations, as alleged in paragraphs 4, 7-9, and 11-12 of the Complaint.[16]

On October 13, 2015, the Administrator filed Complainant's Petition for Appeal of Initial Decision; Supporting Brief [Appeal Petition], and, on November 24, 2015, Mr. Ramos filed Respondent, Lancelot Kollman Ramos a/k/a Lancelot Ramos a/k/a Lancelot Kollman's Response to Appeal Petition [Response to Appeal Petition]. On December 18, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

II. DECISION

A. Summary of the Decision

Based upon a careful consideration of the record, I affirm the ALJ's Decision and Order; except that, I find Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.138, as alleged in paragraph 12 of the Complaint and the Notice of Correction to Complaint, and I increase the $6,650 civil penalty assessed by the ALJ to $66,050.

B. Statutory and Regulatory Framework

The purpose of the Animal Welfare Act is to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons engaged in using animals for research, experimentation, or exhibition or holding animals for sale as pets (7 U.S.C. § 2131).

The Animal Welfare Act defines the term "dealer" as including any person who, in commerce, for compensation or profit, delivers for

[15] ALJ's Decision and Order at 33-35.
[16] ALJ's Decision and Order at 26, 32-33.

transportation or transports (except as a carrier), buys, sells, or negotiates the purchase or sale of any animal for research, teaching, exhibition, or use as a pet (7 U.S.C. § 2132(f)). The Animal Welfare Act requires that each dealer obtain an Animal Welfare Act license, as follows:

> **§ 2134. Valid license for dealers and exhibitors required**
>
> No dealer . . . shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer . . . under this chapter any animals, unless and until such dealer . . . shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

7 U.S.C. § 2134.

The Animal Welfare Act authorizes the Secretary of Agriculture to issue regulations to effectuate the purposes of the Animal Welfare Act (7 U.S.C. § 2151). The Regulations require any person operating as a dealer to have an Animal Welfare Act license (9 C.F.R. § 2.1(a)(1)).[17] The Regulations prohibit any person whose Animal Welfare Act license has been revoked from buying, selling, transporting, exhibiting, or delivering for transportation, any animal during the period of revocation (9 C.F.R. § 2.10(c)).

The Regulations also prohibit an Animal Welfare Act licensee from abusing or harassing an APHIS official when that APHIS official is performing his or her duties (9 C.F.R. § 2.4) and impose standards for adequate veterinary care (9 C.F.R. § 2.40(b)(2)), humane handling (9 C.F.R. § 2.131(b)(1)), transportation (9 C.F.R. § 3.138), and feeding (9 C.F.R. § 3.129) of covered animals, as well as, environment enhancement for nonhuman primates (9 C.F.R. § 3.81).

[17] 9 C.F.R. § 2.1(a) contains exceptions from the requirement that each dealer obtain an Animal Welfare Act license that are not relevant to this proceeding.

The Animal Welfare Act authorizes the Secretary of Agriculture to assess civil penalties, issue cease and desist orders, and suspend or revoke Animal Welfare Act licenses for violations of the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)). In addition, the Animal Welfare Act provides that any person who knowingly fails to obey a cease and desist order issued by the Secretary of Agriculture shall be subject to a civil penalty (7 U.S.C. § 2149(b)).

III. AFFIRMATIVE DEFENSES

Mr. Ramos raised two affirmative defenses, laches and selective prosecution,[18] both of which the ALJ rejected.[19] Mr. Ramos did not appeal the ALJ's rejection of his affirmative defenses.

A. Summary of Admissions, Stipulation, and Evidence

1. Admissions

Mr. Ramos admitted that, in *Octagon Sequence of Eight, Inc.*, AWA Docket No. 05-0016, 66 Agric. Dec. 1093 (U.S.D.A. Oct. 2, 2007), the Secretary of Agriculture revoked Mr. Ramos's Animal Welfare Act license. The Secretary of Agriculture's order revoking Mr. Ramos's Animal Welfare Act license became effective October 19, 2009.[20]

2. Stipulation

The parties stipulated that, on or about November 5, 2009, Mr. Ramos delivered for transportation, sold, and/or negotiated the sale of the animals described in ALJX 1[21] to Jennifer Caudill.

[18] Answer at 2.
[19] ALJ's Decision and Order at 2-3.
[20] Compl. ¶ 1 at 1; Answer ¶ 1 at 1.
[21] ALJX 1 identifies the animals as two zebras, two llamas, two camels, twenty-six or twenty-eight tigers, and one liger.

3. Summary of the Evidence

Mr. Ramos has worked as a circus performer and animal trainer his entire life (Tr. at 341). Mr. Ramos cared for numerous elephants owned by his family, several circuses, and other individuals (Tr. at 348-49). In 2004, Mr. Ramos acquired an elephant named "Ned" from William Woodcock (Tr. at 347). Mr. Ramos was aware of rumors that something was wrong with Ned and was aware that Ned was thin, but Mr. Ramos did not know Ned had health problems (Tr. at 347). Mr. Ramos felt confident he could care for Ned with the help of his veterinarian, Dr. Thomas B. Schotman, who had cared for Ned in the past (Tr. at 350).

When Ned first moved to Mr. Ramos's facility, he did well, but he soon experienced recurring bouts of refusing to drink and eating dirt (Tr. at 357, 360). Mr. Ramos treated Ned's food with cilium to encourage the evacuation of the sand and dirt that Ned ate (Tr. at 361). Mr. Ramos described a "constant battle of eating the dirt, feeding him, trying to keep weight on him." (Tr. at 362). Mr. Ramos consulted elephant veterinarians and experts, but none was familiar with Ned's symptoms (Tr. at 362-63).

Dr. Schotman tried to determine the cause of Ned's problems and recommended several dietary changes (Tr. at 364). Ned's symptoms did not respond to beet pulp, hay, bran, corn, cracked corn, horse feed, or senior horse feed. *Id.* Mr. Ramos gave Ned the Mazuri brand of elephant feed, which contains 24 percent protein, but Ned then developed bumps on the outside of his stomach that burst and became open wounds (Tr. at 365). Dr. Schotman conducted tests of Ned's stool and urine and tested Ned for tuberculosis. *Id.* Eventually, Dr. Schotman speculated Ned had ulcers, and he prescribed 100 tablets daily of Tagamet, which had no effect (Tr. at 366).

When Dr. Gregory Gaj, an APHIS supervisory animal care specialist (Tr. at 81), inspected Mr. Ramos's facility on January 10, 2008, he observed that Ned looked thin, and Mr. Ramos told Dr. Gaj about Ned's problems (Tr. at 368-69). Dr. Gaj suggested consulting with Dr. Schotman, which was what Mr. Ramos had been doing (Tr. at 369). Mr. Ramos's regular APHIS inspector, Carol Porter, had not remarked on

Ned's weight, although Mr. Ramos told Ms. Porter of Ned's issues (Tr. at 369-70).

In April 2008, Mr. Ramos was offered a job with an elephant in Bangor, Maine, and he thought more exercise and a change of scenery would help Ned (Tr. at 367). Mr. Ramos was not concerned about transporting Ned because Ned appeared to have gained some weight and he thought Ned might improve with some stimulation (Tr. at 367-68). During an October 29, 2008, inspection of Mr. Ramos's facility, an APHIS inspector raised concerns about a tiger and a lion. Mr. Ramos addressed the APHIS inspector's concern about his tiger, explaining that one of his tigers had clawed another on the bottom of the foot while the tigers had been playing with a ball on the day before the APHIS inspection (Tr. At 379). Mr. Ramos separated the injured tiger from the others, as was the standard recommendation from Dr. Schotman (Tr. At 380). Mr. Ramos had called Dr. Schotman, but had not heard from him by the time of the October 29, 2008, inspection (Tr. at 380-81). Mr. Ramos also addressed the APHIS inspector's concern about his lion, explaining he was given two lions that developed wobbling, drooling, and other unusual symptoms. Dr. Schotman had been unable to diagnose a cause for the symptoms or to develop an effective treatment (Tr. at 384-85). Mr. Ramos and Dr. Schotman had tried various diets and vitamins, but the lions eventually had to be euthanized (Tr. at 386).

A retired organ grinder gave Mr. Ramos two capuchin monkeys shortly before the October 29, 2008, inspection (Tr. at 386). The APHIS inspector informed Mr. Ramos he was required to have a written plan of environmental enrichment for the monkeys. After the October 29, 2008, inspection, Dr. Schotman provided a written plan at Mr. Ramos's request (Tr. at 387).

Dr. Schotman has worked as a clinical veterinarian for thirty-three years and has treated over 100 different species of animals, including domestic pets, elephants, tigers, lions, bears, and reptiles (Tr. at 400). Dr. Schotman first began treating elephants when he lived near Circus World in Florida (Tr. at 400-01). By the end of the 1980s, Dr. Schotman was caring for 45 elephants, including Mr. Ramos's elephants (Tr. at 402-03).

Dr. Schotman knew Ned since his birth and saw him frequently after Mr. Woodcock purchased Ned (Tr. at 404-05). When Dr. Schotman first began examining Ned, Ned did not have any apparent health issues, had normal physical examinations, and was on a routine deworming and vaccination program (Tr. at 405-06). Dr. Schotman did not observe any problems with Ned's nutrition and assessed Ned's body score as a four or five on a scale of nine (Tr. at 406-07).

At some point, Ned began eating dirt, which is characteristic of elephants with upset stomachs (Tr. at 407-08). Ned developed a chronic condition of not eating or drinking for a day or two and then eating only roughage, despite treatments introduced by Mr. Ramos (Tr. at 409). Ned ate a large amount of hay, and it appeared as though grain would induce a "setback" (Tr. at 410). Ned may have experienced pain or discomfort, and Dr. Schotman treated Ned with non-steroid, anti-inflammatory medication. *Id.* Dr. Schotman and Mr. Ramos discussed Ned's diet many times, and Dr. Schotman recommended a diet that included palliative grain and access to roughage at all times (Tr. at 411). Dr. Schotman noted Ned's symptoms and his treatment in his records (Tr. at 412-13; RX 7; CX 22). Dr. Schotman and Mr. Ramos tried a variety of diets and medications (Tr. at 413). Ned's fecal tests were clear for parasites and, at times, Dr. Schotman concluded Ned had gained some weight (Tr. at 417). Dr. Schotman believed Mr. Ramos took good care of his animals, and Mr. Ramos often called Dr. Schotman or another veterinarian to discuss problems (Tr. at 403-04). Dr. Schotman discussed Ned's problems with other veterinarians, who agreed that ulcers could have caused Ned's condition (Tr. at 419). Dr. Schotman prescribed a product used for horses with ulcers, but that product had no effect on Ned's condition (Tr. at 420).

In January 2008, Dr. Schotman was made aware that Dr. Gaj had concerns about Ned's eating problems (Tr. at 422). Dr. Schotman sent a letter, dated January 14, 2008, to Dr. Gaj describing his treatment of Ned (Tr. at 422-23). Based on his examination in March 2008, Dr. Schotman believed Ned was healthy enough to travel to Bangor, Maine, and to work in a show (Tr. at 429). Dr. Schotman concluded from his examination of Ned in September 2008, that Ned was fit to travel to Columbus, Georgia, for a show (Tr. at 430, 468-69; RX 7 at 44(a)). Ned's blood and fecal tests were normal, Ned had not eaten dirt for

some time, and Dr. Schotman believed Ned had gained weight (Tr. at 431). Dr. Schotman thought Ned was improving. *Id.*

Dr. Schotman explained he kept no record of Ned's weight because weighing an elephant is an ordeal that involves finding a large scale (Tr. at 432). In Dr. Schotman's opinion, the actual weight is not as important as being aware of the animal's body condition and weight gain or loss. Id. He assigns a body score based on the muscle mass, visibility of bones, and size (Tr. at 433). Dr. Schotman was not concerned about Ned's general health because Mr. Ramos followed a good plan of nutrition (Tr. at 435).

Dr. Schotman noted on a report dated November 7, 2008 that he had spoken about Ned with Dr. Schmidt, a veterinarian for Ringling Brothers (Tr. at 438-39). Dr. Schmidt and his associate, Dr. Weidener, had concluded that Ned had an ulcerative disease that could not be definitively diagnosed (Tr. at 439). Dr. Schotman disagreed with APHIS inspector Carol Porter's assertion that only a minimal number of diagnostic tests had been performed, explaining that no test could have been given to see the inside of Ned's stomach (Tr. at 440). An endoscopy would have put an elephant at risk as general anesthesia and an especially long scope would be required (Tr. at 475). Ultrasound was not developed at that time to penetrate the thick hide of an elephant (Tr. at 479). Dr. Schotman agreed with Ms. Porter that an expert should be consulted, and Dr. Schotman believed that he had consulted experts (Tr. at 441).

Dr. Schotman agreed that the quantity of food Ned was eating would not be sufficient for a normal elephant, but Ned had periods of refusing to eat regardless of the quality or quantity of food offered (Tr. at 443-44). Dr. Schotman denied that low mineral scores on Ned's tests indicated malnutrition (Tr. at 488-89). Dr. Schotman distinguished between malnutrition due to inadequate diet and an inability to process food (Tr. at 489).

Dr. Schotman was aware that APHIS confiscated Ned and moved Ned to a facility in Tennessee where Ned died six months later (Tr. at 445). A postmortem of the elephant identified severe chronic ulceration of the bowel, which was consistent with Ned's symptoms (Tr. at 446).

The scar tissue would have inhibited Ned's ability to absorb nutrients (Tr. at 490).

Dr. Schotman was familiar with Mr. Ramos's lions, which appeared to have cerebellar syndrome that caused ataxia (Tr. at 426). Dr. Schotman observed that other lions around the world were experiencing this problem, which he attributed to genetics (Tr. at 427).

Dr. Schotman believed Mr. Ramos's lions came from a breeder in Texas, and he postulated that inbreeding caused the lions' condition (Tr. at 428).

Dr. Schotman testified that Mr. Ramos had telephoned on October 27, 2008, to report that one of his tigers had a bite wound on her forepaw that was draining and swelling (Tr. at 449-50, 459). Dr. Schotman prescribed an antibiotic and directed that Mr. Ramos bring the tiger to the veterinary hospital if she showed no improvement in five to seven days (Tr. at 450). Dr. Schotman prepared an environmental enrichment plan for Mr. Ramos's capuchin monkeys and he discussed their diet and management with Mr. Ramos (Tr. at 451). Dr. Schotman recalled examining and testing the capuchin monkeys in September 2008, and finding them to be normal. *Id.* He did not know when Mr. Ramos first acquired the monkeys (Tr. at 455).

Dr. Susanne Brunkhorst is a veterinarian who has worked as an APHIS veterinary medical officer in Tennessee for more than ten years (Tr. at 28). Before joining APHIS, Dr. Brunkhorst worked in her own veterinary practice for thirteen years (Tr. at 29). On September 11, 2009, Dr. Brunkhorst inspected the Triple W Alternative Livestock Auction in Cookeville, Tennessee, which is an animal auction that sells exotic animals (Tr. at 30). Dr. Brunkhorst observed two lions and four tigers in enclosures that were inside a trailer parked on the Triple W Alternative Livestock Auction premises (Tr. at 34-35).

After Mr. Ramos, the owner of the animals and the trailer, arrived at the trailer, Dr. Brunkhorst inspected Mr. Ramos's trailer, took pictures of the trailer and its contents, and reviewed Mr. Ramos's records (Tr. at 37; CX 51). Dr. Brunkhorst concluded the ventilation of the trailer was not sufficient for the animals during transport because ventilation could only

be achieved by opening the trailer doors, which presented the risk of exposing the animals to noxious fumes and other environmental hazards (Tr. at 38). Dr. Brunkhorst prepared an inspection report that cited Mr. Ramos for a violation of 9 C.F.R. § 3.138 (Tr. at 40; CX 26).

Dr. Brunkhorst was familiar with horse trailers that allow the entry of air while the trailers are being moved, and she acknowledged that noxious fumes could enter those trailers (Tr. at 44-45). Dr. Brunkhorst described the doors on Mr. Ramos's trailer as spanning the entire height of the trailer, and the opening being approximately one to one and one-half feet. She observed two doors that were on the sides of the trailer, with one door toward the front of the trailer and one door toward the back of the trailer (Tr. at 47). Those doors were open when Mr. Ramos moved the trailer (Tr. at 50).

James Finn has worked as an APHIS investigator for 36 years, and, in the ordinary course of his duties, he investigated the exhibition of Ned (Tr. at 76). As part of his investigation, Mr. Finn interviewed Serge Landkas, who recalled exhibiting Ned at an event in Georgia on September 13-14, 2008, under contract with Mr. Ramos. Mr. Landkas informed Mr. Finn that Ned gave at least five performances and gave elephant rides during the event (Tr. at 77).

Dr. Gaj is a supervisory animal care specialist for APHIS (Tr. at 81). He has been in this position for twelve years and is responsible for supervising APHIS inspectors who conduct animal welfare inspections in Florida, Georgia, Mississippi, and Puerto Rico (Tr. at 82). Before he became a supervisor, Dr. Gaj was an APHIS veterinary medical officer in Arkansas for over 11 years (Tr. at 83). Prior to joining APHIS, Dr. Gaj practiced veterinary medicine at Companion Animal Medicine and Emergency Medicine in Texas (Tr. at 83-84).

During 2008 and 2009, Dr. Gaj supervised Carol Porter, who was the APHIS inspector assigned to inspect Mr. Ramos'ss facility (Tr. at 84). Dr. Gaj recalled accompanying Ms. Porter on inspections of Mr. Ramos's facility on two occasions, the first of which occurred on January 10, 2008. Id. During that inspection, Dr. Gaj observed that the elephant identified as "Ned" appeared thin and he discussed the issue with Mr. Ramos (Tr. at 85). Dr. Gaj told Mr. Ramos that he

should try to get a baseline weight for Ned at a truck weight facility, so that Mr. Ramos could assess Ned's weight changes (Tr. at 86-87). Mr. Ramos did not believe weighing Ned was necessary because he was able to gauge whether Ned lost or gained weight by visual inspection (Tr. at 372-73). Mr. Ramos told Dr. Gaj that he visually assessed Ned's weight (Tr. at 87).

Dr. Gaj attended another inspection of Mr. Ramos's facility on October 29, 2008, and, after that inspection, he contacted Mr. Ramos'ss veterinarian, Dr. Schotman, to share his concerns that Ned had lost significant weight since the January 10, 2008, inspection and that Ned seemed subdued and lethargic (Tr. at 88-89, 101-02). Dr. Gaj asked Dr. Schotman about diagnostics and treatment for Ned. Dr. Schotman advised that routine blood work and fecal studies had been performed (Tr. at 90). In Dr. Gaj's opinion, no attempt had been made to determine the cause of Ned's weight loss. *Id.* Dr. Schotman confirmed that Ned's weight had been assessed only visually (Tr. at 91). Dr. Schotman also advised that Mr. Ramos had exhibited Ned and that he had provided a health certificate in prior months to Mr. Ramos. *Id.* Dr. Gaj believed Ned should not have been exhibited and explained that subjecting Ned to excessive exercise, working, and travel would make Ned more susceptible to additional problems (Tr. at 92). At the second inspection on October 29, 2008, Ms. Porter drafted an inspection report with input from Dr. Gaj that documented Dr. Gaj's observations and concerns about Ned's condition (Tr. at 92-94; CX 44).

Dr. Gaj testified that Ms. Porter spoke with Mr. Ramos about Ned's diet, and Mr. Ramos told Ms. Porter he was feeding Ned about 15 pounds of Mazuri, a pellet ration specifically formulated for elephants (Tr. at 99). Dr. Gaj asked Mr. Ramos to demonstrate how much he was feeding Ned, and Mr. Ramos used scoops to show the amount of feed (Tr. at 100). When asked to weigh the feed, Mr. Ramos used a bathroom scale that showed the pellets weighed closer to eleven pounds than fifteen pounds. *Id.* Mr. Ramos also reported leaving timothy hay for Ned to eat in whatever amount he wished and feeding Ned different vegetables (Tr. at 100-01). Mr. Ramos disclosed that Ned was eating a large amount of sand and dirt, but Dr. Gaj did not discuss that with Dr. Schotman (Tr. at 101). Dr. Gaj could not determine why Ned had lost weight (Tr. at 158).

Dr. Gaj acknowledged that he did not identify any noncompliant items during his January 10, 2008, inspection of Mr. Ramos'ss facility (Tr. at 117; RX 8 at 1). Dr. Gaj received a letter dated January 14, 2008, from Dr. Schotman which states Dr. Schotman had observed that, in the previous two years, Ned began to eat dirt and exhibited symptoms of colic and anorexia (Tr. at 122; RX 7 at 53). Dr. Schotman reported that, when Ned ate grain, he developed "protein bumps" on his abdomen, "which would precipitate more episodes of colic and anorexia." (Tr. at 126-27; RX 7 at 53). Dr. Gaj admitted that, as of Dr. Schotman's January 14, 2008, letter, he was aware that Ned periodically lost weight and ate dirt, but denied that Dr. Schotman's January 14, 2008, letter put him on notice that Ned had medical problems because Dr. Schotman stated in the letter that Ned's problem was an "enigma" (Tr. at 128-29).

Dr. Gaj was aware that APHIS confiscated Ned from Mr. Ramos and sent Ned to the Elephant Sanctuary in Tennessee, but Dr. Gaj was not involved in the confiscation (Tr. at 139). Dr. Gaj also knew Ned died at the Elephant Sanctuary and a necropsy was performed, but Dr. Gaj did not remember if he ever saw the necropsy results (Tr. at 139-40).

Dr. Gaj and Ms. Porter inspected other animals at Mr. Ramos's facility on October 29, 2008, including lions, tigers, and capuchin monkeys (Tr. at 94-95). Dr. Gaj noticed that a tiger appeared lame on the right front paw and observed a lion that appeared to have a stumbling gait, known as "ataxia" (Tr. at 95-96; CX 45). Mr. Ramos told Dr. Gaj and Ms. Porter that he had not consulted his veterinarian immediately about the condition of the tiger, but had contacted him at some point (Tr. at 159). Dr. Gaj did not confirm with Dr. Schotman whether Mr. Ramos consulted him about the lion or tiger (Tr. at 159). Dr. Gaj testified that Mr. Ramos had environmental enhancements for his nonhuman primates, but that Mr. Ramos did not have an environmental enhancement plan (Tr. at 98, 159).

Dr. Genevieve Dumonceaux is a veterinarian who has been employed at the Palm Beach Zoo for three and a half years (Tr. at 171). She graduated from veterinary medical school in 1988 and has since worked primarily in zoos and has consulted nationally and internationally on issues involving elephants (Tr. at 171-73). At the

request of APHIS personnel, Dr. Dumonceaux examined Ned in early November 2008 at Mr. Ramos's facility (Tr. at 173-74). Dr. Dumonceaux's examination was primarily visual, and she observed that Ned appeared thin and emaciated, with a calm and quiet demeanor (Tr. at 175). Ned had a sunken body, and his backbone, the bones of his front legs, skull, and face, tail bones, and shoulder bones were prominent and visible (Tr. at 176). In Dr. Dumonceaux's opinion, Ned's condition was not normal for a 20-year-old elephant (Tr. at 176). Ned was underweight and appeared to lack normal muscular development (Tr. at 177). Dr. Dumonceaux assigned Ned a body condition score of "3" on a scale of 1 to 11, which is considered "emaciated" on that scale (Tr. at 182-83). Dr. Dumonceaux testified she would have recommended that Ned not perform until his condition improved (Tr. at 177-78). Dr. Dumonceaux was familiar with elephants used to give rides and with the equipment used for elephant rides (Tr. at 178). Ned's spine was prominent and there was little musculature to support the equipment (Tr. at 179).

Dr. Dumonceaux summarized her findings in an affidavit (Tr. at 181-82; CX 42). Dr. Dumonceaux would have started treatment of Ned's emaciation by trying to diagnose a cause for the condition, by collecting blood for a complete blood count and a serum chemistry evaluation, collecting urine for a urinalysis, and collecting feces for a parasite exam (Tr. at 186). She would have recommended that Ned have hay and water available at all times (Tr. at 186-87). Dr. Dumonceaux did not recall knowing Ned's diet (Tr. at 187). Dr. Dumonceaux had observed some abnormality in Ned's feces that she would have investigated, and she saw evidence of some separation on the heels of his back feet and some pad separation and smoothness that she considered "less than ideal" (Tr. at 189).

Dr. Dumonceaux did not observe Ned for a long time out of the trailer that was used to transport him to the Elephant Sanctuary in Tennessee, but she administered some medication to protect him during the trip because she had some concern about his ability to travel (Tr. at 184-85, 190). Dr. Dumonceaux recommended frequent rest stops to allow Ned to relax. Dr. Dumonceaux did not see Ned again after November 2008, and she did not speak with Mr. Ramos or Dr. Schotman

(Tr. at 191, 193). She did not review Ned's treatment records (Tr. at 192).

Dr. Denise Sofranko has worked for APHIS since 1988 and has been APHIS' field specialist for elephants since 2003 (Tr. at 198-99). She accompanied APHIS inspectors during two inspections of Mr. Ramos's facility, and, at the first inspection in 2004, Dr. Sofranko observed Ned and found he was in good physical shape (Tr. at 201). She next saw Ned on November 7, 2008, when she accompanied APHIS inspector Carol Porter to Mr. Ramos'ss facility. Dr. Sofranko observed that Ned was emaciated and lethargic (Tr. at 202). Dr. Sofranko spoke with Mr. Ramos, who became agitated and questioned Dr. Sofranko's presence (Tr. at 203; CX 35). Dr. Sofranko did not recall what Mr. Ramos said other than that he yelled at her, used profanity, and called her names (Tr. at 204-05). Dr. Sofranko moved away from Mr. Ramos in order to better observe Ned and Mr. Ramos continued to speak loudly to Ms. Porter (Tr. at 207).

Dr. Sofranko did not recall seeing any food in Ned's enclosure during her visit on November 7, 2008, but she saw Mazuri in a food storage bin that was not immediately available to Ned (Tr. at 208-10). Dr. Sofranko viewed photographs taken at the inspection and confirmed the photographs were consistent with her observations of Ned at that time (Tr. at 211; CX 49). Dr. Sofranko acknowledged that hay appeared in one of the photographs, but she did not recall seeing the hay upon arrival at Mr. Ramos's facility (Tr. at 211). Dr. Sofranko was aware that Ms. Porter drafted an inspection report, but Dr. Sofranko did not consult with Ms. Porter about the report (Tr. at 212-13; CX 48). Ms. Porter also prepared a second report and a notice of confiscation that she delivered to Mr. Ramos (Tr. at 213).

APHIS weighed Ned on November 7, 2008, after confiscating him from Mr. Ramos (Tr. at 215). Dr. Sofranko was present when Ned was weighed, and she saw the certificate of his weight at that time, which she believed indicated that Ned weighed 7,260 pounds (Tr. at 216-18; CX 50). APHIS personnel concluded the Elephant Sanctuary was an appropriate place for Ned because they wanted to minimize Ned's time in transit (Tr. at 220). Dr. Sofranko followed the trailer containing Ned to the Elephant Sanctuary and was present when Ned was unloaded (Tr.

at 222-23). Dr. Sofranko had no conversations with Ned's veterinarian, and she did not arrange for Ned's treatment records to be sent to the Elephant Sanctuary. *Id.* Dr. Sofranko did not communicate with the Elephant Sanctuary about Ned's well-being after she left him there, but was aware he had died and a necropsy had been performed (Tr. at 224-25). Dr. Sofranko did not recall the results of the necropsy, although she believed Dr. Brunkhorst, who is the APHIS inspector for the Elephant Sanctuary, gave her the results (Tr. at 225). Dr. Sofranko testified that any information about Ned's condition would have been verbally communicated to her, and she did not recall any reports about Ned's eating difficulties. *Id.* Dr. Sofranko did not know if Ned was weighed when he was at the Elephant Sanctuary and did not know whether Ned had gained or lost weight while at the Elephant Sanctuary (Tr. at 226).

Brian Franzen is licensed by the Secretary of Agriculture to exhibit animals, and he currently owns three elephants (Tr. at 297). Mr. Franzen has known Mr. Ramos for twenty-five years and was familiar with Ned (Tr. at 298). Mr. Franzen knew Ned when Mr. Woodcock owned him and he noticed that Ned was tall, but had not "filled out." *Id.* In Mr. Franzen's opinion, a large bull elephant, such as Ned, should have been husky and not lanky (Tr. at 298-99). Mr. Franzen was aware that Ned had trouble gaining weight even before Mr. Ramos owned him and that all of Ned's owners had tried different kinds of food in efforts to put weight on Ned (Tr. at 299).

Mr. Ramos discussed Ned's condition many times with Mr. Franzen and other elephant owners (Tr. at 300-01). Mr. Ramos spoke with Mr. Franzen's veterinarian, Dr. Mark Wilson, as well as veterinarians Dr. Schotman and Dr. Dennis Schmidt (Tr. at 301). Mr. Franzen and others discussed worming techniques, and Mr. Franzen brought hay from Wisconsin because it is of better quality than hay from Florida (Tr. at 302). Ned was not interested in the hay, though Mr. Franzen's elephants were enthusiastic about it. Id. In Mr. Franzen's opinion, Mr. Ramos was very committed to Ned and actively tried to solve Ned's weight problem (Tr. at 302-03). Everyone in the elephant industry was concerned about Ned and discussed what could be done for Ned (Tr. at 304-05).

Mr. Franzen did not know exactly what Mr. Ramos fed Ned, but every time Mr. Franzen visited Mr. Ramos's facility, he saw that hay, grain, fruits, and vegetables were available for Ned (Tr. at 300, 309). Mr. Franzen was aware that Ned was eating dirt, and he testified his own elephants often eat dirt (Tr. at 309-10). Mr. Franzen did not think Ned needed to be weighed because an elephant's weight can vary greatly, and the process of weighing an elephant creates safety and liability issues (Tr. at 306-07). He explained: "unless you have your own scale right in your yard, [it] is very difficult. You've got to go to a truck stop or somewhere, you have to keep the public away, which is very difficult. And it becomes a liability and a safety issue." (Tr. at 306-07). Mr. Franzen explained that elephants benefit from the stimulation and variety of travel (Tr. at 313). He denied that transporting elephants is stressful to them and cited to a study completed by a team of veterinarians, which measured the effects of travel on elephants' health (Tr. at 314-15).

Terry Frisco has been an elephant trainer for over thirty years and has known Mr. Ramos for 20 years (Tr. at 322). He knew Ned well and was aware that Ned had trouble keeping on weight (Tr. at 323). Mr. Frisco lives close to Mr. Ramos and visited him frequently (Tr. at 335). Mr. Frisco was familiar with Mr. Ramos's care for Ned, and he knew Mr. Ramos had traveled far to get hay for Ned (Tr. at 323). Mr. Frisco thought it was ill advised of Mr. Ramos to acquire Ned because of how thin Ned was, and he advised Mr. Ramos to give Ned a variety of different foods (Tr. at 324). Mr. Ramos tried many things to keep Ned from eating dirt, which was Ned's habit before Mr. Ramos acquired him (Tr. at 325).

Mr. Frisco talked with Dr. Schotman about Ned's weight and they speculated whether Ned had eaten something that was stuck in his intestines or if he had ulcers (Tr. at 326). Dr. Schotman was the veterinarian for Mr. Frisco's elephants for more than twenty years, and Mr. Frisco considered Dr. Schotman a well-qualified veterinarian experienced with elephants (Tr. at 328). Other veterinarians consult Dr. Schotman, and elephant owners consult him even when they have other veterinarians (Tr. at 329).

Before Ned was confiscated, Mr. Ramos called Mr. Frisco frequently to express concern about Ned's health and weight (Tr. at 336). Mr.

Frisco did not know Ned's weight, but he observed that elephants that do not feel well could lose weight by not drinking water. *Id.*

III. DISCUSSION

A. Non-Interference with APHIS Inspectors - 9 C.F.R. § 2.4

The Administrator alleges, on November 7, 2008, Mr. Ramos verbally abused and harassed APHIS inspectors in the course of their duties, in violation of 9 C.F.R. § 2.4.[22] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. § 2.4, as alleged in paragraph 4 of the Complaint.[23] The Administrator contends the ALJ's failure to find that Mr. Ramos verbally abused and harassed APHIS inspectors, is error (Administrator's Appeal Pet. ¶ IIA at 5-10).

In a memorandum dated November 18, 2008, Ms. Porter summarized the events of November 7, 2008, when APHIS inspectors inspected Mr. Ramos's facility (CX 18). Ms. Porter reported Mr. Ramos became "agitated" about the inspection and became "verbally abusive." *Id.* Dr. Sofranko testified Mr. Ramos used profanities and was hostile to her (Tr. at 204-05). Mr. Ramos admitted he was upset and probably owed Dr. Sofranko an apology (Tr. at 376).

The Administrator cites Dr. Sofranko's testimony (Tr. at 203-08, 228), Ms. Porter's November 18, 2008, memorandum (CX 18), and Dr. Sofranko's April 9, 2009, affidavit (CX 35), as support for the Administrator's contention that a preponderance of the evidence establishes Mr. Ramos verbally abused and harassed Dr. Sofranko and Ms. Porter while they inspected Mr. Ramos's facility on November 7, 2008. However, Ms. Porter completed two inspection reports on November 7, 2008, following the inspection of Mr. Ramos's facility (CX 43, CX 48). Ms. Porter identifies and describes Mr. Ramos's purported violations of 9 C.F.R. §§ 2.40(b)(2), 2.131(b)(1), and 3.129(a), but does not mention verbal abuse, harassment, or any violation of 9 C.F.R. § 2.4. Based upon the record and particularly the inspection reports completed by Ms. Porter on the day the verbal abuse and harassment are alleged to

[22] Compl. ¶ 4 at 2.
[23] ALJ's Decision and Order at 22, 32.

have occurred, I decline to disturb the ALJ's finding that the Administrator failed to prove Mr. Ramos violated 9 C.F.R. § 2.4, on November 7, 2008.

B. Operating as a Dealer Without a License - 7 U.S.C. § 2134, 9 C.F.R. §§ 2.1(a), 2.10(c)

The Administrator alleges, from October 19, 2009, through November 8, 2010, Mr. Ramos operated as a dealer without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).[24] The ALJ found, during the period October 19, 2009, through November 8, 2009, Mr. Ramos operated as a dealer by transporting and selling 33 animals without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), as alleged in paragraph 5 of the Complaint.[25] Mr. Ramos contends, while he sold thirty-three animals to Jennifer Caudill after the effective date of the Secretary of Agriculture's order revoking his Animal Welfare Act license, at the time of the sale, he believed he had a "grace period" within which to sell his animals (Mr. Ramos's Resp. to Appeal Pet. ¶ D at 6-7).

Mr. Ramos admits that, in *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093 (U.S.D.A. 2007), the Secretary of Agriculture issued an order revoking his Animal Welfare Act license and the Secretary of Agriculture's order became effective on October 19, 2009.[26] The parties stipulated that, on or about November 5, 2009, Mr. Ramos transported, sold, and/or negotiated the sale of 33 animals to Ms. Caudill.[27] Mr. Ramos's admissions and the parties' stipulation establish that Mr. Ramos operated as a dealer without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c). I find no evidence that Mr. Ramos had a grace period within which to sell his animals after the Secretary of Agriculture's order revoking his Animal Welfare Act license became effective. Accordingly, I agree with the ALJ that the record supports the conclusion that, during the period October 19, 2009, through November 8, 2009, Mr. Ramos operated as a dealer without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a)

[24] Compl. ¶ 5 at 2-3.
[25] ALJ's Decision and Order at 23, 33.
[26] Compl. ¶ 1 at 1; Answer ¶ 1 at 1.
[27] ALJX 1.

and 2.10(c), when he transported and sold thirty-three animals to Ms. Caudill.

C. Handling Animals - 9 C.F.R. § 2.131(b)(1)

The Administrator alleges, from June 1, 2008, through October 29, 2008, Mr. Ramos failed to handle an elephant named "Ned" as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, when Mr. Ramos exhibited Ned while Ned was visibly emaciated and in compromised health, in violation of 9 C.F.R. § 2.131(b)(1).[28] The ALJ found, by exhibiting Ned at an event in Georgia on September 13-14, 2008, Mr. Ramos failed to handle Ned as required by 9 C.F.R. § 2.131(b)(1).[29] Neither the Administrator nor Mr. Ramos appealed the ALJ's finding that Mr. Ramos violated 9 C.F.R. § 2.131(b)(1), as alleged in paragraph 6 of the Complaint, but both the Administrator and Mr. Ramos appealed the amount of the civil penalty the ALJ assessed for Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1). I address the Administrator's appeal and Mr. Ramos's appeal of the civil penalty assessed by the ALJ for Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) in this Decision and Order, *infra*.

D. Veterinary Care for an Elephant - 9 C.F.R. § 2.40(b)(2)

The Administrator alleges, between January 10, 2008, and November 7, 2008, Mr. Ramos failed to provide adequate veterinary care to an elephant named "Ned," in violation of 9 C.F.R. § 2.40(b)(2).[30] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 7 of the Complaint.[31] The Administrator contends the ALJ's failure to find Mr. Ramos did not provide adequate veterinary care to Ned, is error (Administrator's Appeal Pet. ¶ IIB2 at 13-20). Mr. Ramos contends there is no reason to depart from the ALJ's finding that the Administrator did not prove that Mr. Ramos failed to provide adequate veterinary care to Ned (Mr. Ramos's Resp. to Appeal Pet. ¶ A at 1-5).

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[28] Compl. ¶ 6 at 3.
[29] ALJ's Decision and Order at 23-24, 33.
[30] Compl. ¶ 7 at 3.
[31] ALJ's Decision and Order at 25-26, 33.

Ned's attending veterinarian, Dr. Schotman, was aware of Ned's eating disorder and Ned's trouble gaining weight. Dr. Schotman's clinical records document that he attempted to address Ned's problems by, among other things, giving Ned deworming medicine, antibiotics, banamine for pain, Pepto-Bismol, mineral oil, and electrolytes (RX 7). Dr. Gaj conceded Dr. Schotman was qualified to serve as attending veterinarian and his treatment of Ned appeared reasonable at the time (Tr. at 132).

Although the Administrator's witnesses asserted additional diagnostic tests could have been performed to assess Ned's condition and find a cure, Dr. Gaj did not suggest a specific test. The diagnostic tools Dr. Dumonceaux recommended (blood count, serum chemistry evaluation, and urine and fecal analysis) were the tests Dr. Schotman had conducted (Tr. at 186). Dr. Dumonceaux's recommended diagnostic tests and diet were consistent with how Ned was treated and fed. The ALJ accorded substantial weight to Dr. Schotman's explanation, corroborated by elephant expert, Mr. Frisco, that no scan or other test was available to make a definite diagnosis of Ned's condition. Dr. Schotman's conclusion, bolstered by Dr. Schmidt and Dr. Weidner, that Ned suffered from an ulcerative condition of the intestines proved correct, as necropsy revealed.

The record establishes that Mr. Ramos sought the opinions of other elephant experts and veterinarians about the cause of Ned's chronic digestive problem. Dr. Schotman consulted elephant veterinarians, Drs. Schmidt and Weidner, who suspected that ulcers caused Ned's problems (Tr. at 439). Neither Ms. Porter nor Dr. Gaj provided specific suggestions to treat Ned's condition other than to recommend that Mr. Ramos weigh Ned. Dr. Gaj believed a baseline weight would have been helpful in assessing Ned's progress. Mr. Ramos, Mr. Franzen, and Dr. Schotman testified that an elephant's weight changes could be visually determined.

Ms. Porter and Dr. Gaj were able to assess Ned's weight based upon a physical inspection alone (Tr. at 86, 88, 143). Ned was finally weighed on November 7, 2008, when APHIS confiscated him from Mr. Ramos (CX 50). Weighing Ned did not improve Ned's health, as demonstrated by the statements of a veterinarian who examined Ned

on December 26, 2008, at the Elephant Sanctuary and assigned him a body score of "2," "indicating an emaciated animal" (CX 40). The most compelling evidence that weighing Ned had no impact on his condition is Ned's death after APHIS confiscated Ned from Mr. Ramos and weighed Ned.

Based upon my review of the record, I affirm the ALJ's finding that the Administrator did not prove that Mr. Ramos failed to provide adequate veterinary care to Ned, in violation of 9 C.F.R. § 2.40(b)(2).

E. Veterinary Care for a Tiger - 9 C.F.R. § 2.40(b)(2)

The Administrator alleges, on October 29, 2008, Mr. Ramos failed to provide adequate veterinary care to a tiger named "India," in violation of 9 C.F.R. § 2.40(b)(2).[32] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 8 of the Complaint.[33] The parties did not appeal the ALJ's finding that the Administrator failed to prove that Mr. Ramos did not provide adequate veterinary care to India, in violation of 9 C.F.R. § 2.40(b)(2) (Administrator's Appeal Pet.; Mr. Ramos's Response to Appeal Pet.).

F. Veterinary Care for a Lion - 9 C.F.R. § 2.40(b)(2)

The Administrator alleges, on October 29, 2008, Mr. Ramos failed to provide adequate veterinary care to a lion named "Saby," in violation of 9 C.F.R. § 2.40(b)(2).[34] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 9 of the Complaint.[35] The Administrator contends the ALJ's failure to find that, on October 29, 2008, Mr. Ramos did not provide adequate veterinary care to a lion, is error (Administrator's Appeal Pet. ¶ IIB1 at 10-13). Mr. Ramos contends he sought veterinary treatment for Saby and, thereby, committed no

[32] Compl. ¶ 8 at 3-4.
[33] ALJ's Decision and Order at 26.
[34] Compl. ¶ 9 at 4.
[35] ALJ's Decision and Order at 27, 33.

violation of 9 C.F.R. § 2.40(b)(2) (Mr. Ramos's Response to Appeal Pet. ¶ C at 5-6).

The ALJ, citing testimony by Dr. Gaj and Dr. Schotman, found the evidence related to Mr. Ramos's failure to provide adequate veterinary care to Saby on October 29, 2008, insufficient to establish a violation, as follows:

> Respondent has further been charged with failing to provide adequate care to a lion with an uncoordinated gait. Dr. Gaj testified that lions with similar symptoms could have been treated if the condition was due to a Vitamin A deficiency. Tr. at 151. However, Dr. Schotman credibly testified that he believed the condition was congenital and ultimately untreatable. Tr. at 427. The evidence is in equipoise and insufficient to establish that Respondent failed to provide adequate veterinary care to his lions.

ALJ's Decision and Order at 27.

The Administrator, referencing CX 7, contends Dr. Schotman's own records do not support the testimony relied upon by the ALJ (Administrator's Appeal Pet. ¶ IIB1 at 12); however, CX 7 is not a record prepared by Dr. Schotman, but rather Ms. Caudill's February 13, 2010, affidavit, which has no relevance to Mr. Ramos's purported failure to provide adequate veterinary care to Saby.

The Administrator also contends the record contains no evidence Dr. Schotman conducted any examination to determine whether Saby was suffering from wobble syndrome caused by vitamin A deficiency. Contrary to the Administrator's contention, the record supports a finding that, prior to the October 29, 2008, APHIS inspection of Mr. Ramos's facility, Dr. Schotman examined Saby to determine the cause of, and prescribe a treatment for, Saby's uncoordinated gait:

> [BY MR. COOK:]

> Q..... Had you consulted with Dr. Schotman about these symptoms prior to the day this picture, which is October 29, 2008?
>
> ....
>
> [BY MR. RAMOS:]
>
> A. So this, the US, I took this lion to doc, to Dr. Schotman and they did everything you can think of. We, nobody knew, still to today, nobody knows what this, why these lions have this. Why lions did that.
>
> Q. So the, the point is that this lion was receiving veterinary treatment as of the day of this picture?
>
> A. This lion was receiving veterinary treatment. We had him on like, a different diet, different vitamins, trying to figure out. More calcium, Vitamin A, Vitamin C. We were giving him Vitamin C because we, the Vitamin C we thought would bring out, help another vitamin work faster. This lion actually, as time went by, Dr. Schotman came out and had to euthanize him.

Tr. at 384-86. Therefore, I reject the Administrator's contention that the ALJ erred by failing to find that, on October 29, 2008, Mr. Ramos did not provide adequate veterinary care to a lion, in violation of 9 C.F.R. § 2.40(b)(2).

G. Environment Enhancement - 9 C.F.R. §§ 2.100(a) and 3.81

The Administrator alleges, on October 29, 2008, Mr. Ramos failed to have a written plan for environmental enrichment of two nonhuman primates, in violation of 9 C.F.R. §§ 2.100(a) and 3.81.[36] The ALJ found the evidence is uncontroverted that Mr. Ramos did not have an environmental enrichment plan for two capuchin monkeys on October 29, 2008, in violation of 9 C.F.R. §§ 2.100(a) and 3.81.[37] Mr. Ramos contends he obtained the nonhuman primates just prior to the October 29, 2008, inspection and Dr. Schotman prepared an environmental enrichment plan for Mr. Ramos immediately after the October 29, 2008,

[36] Compl. ¶ 10 at 4.
[37] ALJ's Decision and Order at 27, 34.

inspection; therefore, no factual basis for finding he violated 9 C.F.R. §§ 2.100(a) and 3.81, exists (Mr. Ramos's Resp. to Appeal Pet. ¶ E at 7).

The correction of a violation of the Animal Welfare Act or the Regulations is to be encouraged and may be taken into account when determining the sanction to be imposed for the violation. However, each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and the correction of a violation does not eliminate the fact that the violation occurred.[38] Therefore, I reject Mr. Ramos's contention that, based upon his subsequent correction of the violation, there is no factual basis for finding he violated 9 C.F.R. §§ 2.100(a) and 3.81 on October 29, 2008. I affirm the ALJ finding that Mr. Ramos did not have an environmental enrichment plan for two capuchin monkeys on October 29, 2008, in violation of 9 C.F.R. §§ 2.100(a) and 3.81.

H. Feeding - 9 C.F.R. §§ 2.100(a) and 3.129

The Administrator alleges, between October 29, 2008, and November 7, 2008, Mr. Ramos failed to feed an elephant named "Ned" wholesome, palatable food free of contamination and of sufficient quantity and nutritive value to maintain Ned in good health and failed to prepare a diet with consideration for Ned's condition and size, in violation of 9 C.F.R. §§ 2.100(a) and 3.129.[39] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.129, as alleged in paragraph 11 of the Complaint.[40] The Administrator contends the ALJ's failure to find that, between October 29, 2008, and November 7, 2008, Mr. Ramos did not feed Ned, as required by 9 C.F.R. §§ 2.100(a) and 3.129, is error (Administrator's Appeal Pet. ¶ IID at 20-24).

[38] White, AWA Docket No. 12-0277, 2014 WL 4311058, at *25 (U.S.D.A. May 13, 2014); Greenly, AWA Docket No. 11-0072, 2013 WL 8213615, at *12 (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); Tri-State Zoological Park of Western Maryland, Inc., AWA Docket No. 11-0222, 2013 WL 8214620, at *29 (U.S.D.A. Mar. 22, 2013).
[39] Compl. ¶ 11 at 4.
[40] ALJ's Decision and Order at 33.

The record is replete with evidence of Ned's chronic digestive problems and the efforts to find a palatable diet appropriate for Ned.

The ALJ thoroughly discussed the evidence supporting the Administrator's contention that Mr. Ramos violated 9 C.F.R. § 3.129 and the evidence supporting Mr. Ramos's contention that he complied with 9 C.F.R. § 3.129,[41] and no purpose would be served by repeating the ALJ's thorough discussion here. I have carefully reviewed the evidence, and, based on this review, I agree with the ALJ's finding that the Administrator failed to prove that, between October 29, 2008, and November 7, 2008, Mr. Ramos did not feed Ned, as required by 9 C.F.R. § 3.129.

I. Animal Cargo Space - 9 C.F.R. §§ 2.100(a) and 3.138

The Administrator alleges, on September 11, 2009, Mr. Ramos failed to design and construct animal cargo space on his primary conveyance to protect the health and ensure the safety of four lions and two tigers contained in the animal cargo space, in violation of 9 C.F.R. §§ 2.100(a) and 3.128.[42] The ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.128, as alleged in paragraph 12 of the Complaint and the Notice of Correction to Complaint.[43] The Administrator contends the ALJ's failure to find that, on September 11, 2009, Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.128, is error (Administrator's Appeal Pet. ¶ IIE at 24-31).

The Regulations require the animal cargo space of each primary conveyance to be designed and constructed to protect the health and ensure the safety and comfort of the live animals contained in the animal cargo space (9 C.F.R. § 3.138(a)). The record establishes that, on September 11, 2009, Dr. Brunkhorst, an APHIS veterinary medical officer, conducted an inspection of Mr. Ramos's primary conveyance used to transport four tigers and two lions. Dr. Brunkhorst prepared an inspection report which sets forth her finding that the animal cargo space

[41] ALJ's Decision and Order at 27-29.
[42] Compl. ¶ 12 at 4; Notice of Correction to Compl.
[43] ALJ's Decision and Order at 33.

of the primary conveyance was not designed and constructed to protect the health and ensure the safety and comfort of the animals contained in the animal cargo space (CX 26 at 1). The Administrator called Dr. Brunkhorst as a witness and she described her observations of Mr. Ramos's primary conveyance on September 11, 2009 (Tr. at 37-40, 243-45). In addition, the Administrator introduced pictures of Mr. Ramos's primary conveyance taken by Dr. Brunkhorst on September 11, 2009 (CX 51). Both Dr. Brunkhorst's testimony and the pictures of Mr. Ramos's primary conveyance corroborate Dr. Brunkhorst's September 11, 2009, inspection report. Mr. Ramos testified, when the doors to his primary conveyance are open, the animal cargo space is adequately ventilated for the animals contained in the animal cargo space (Tr. at 342-47).

The ALJ found the evidence regarding Mr. Ramos's September 11, 2009, violation of 9 C.F.R. § 3.138 is in equipoise and fails to establish a violation of 9 C.F.R. § 3.138, as follows:

> Dr. Brunkhorst believed that the trailer that Respondent used to transport felids in Tennessee did not provide enough ventilation unless doors were open, in which case the animals did not have sufficient protection. She was concerned that the animals would be exposed to road debris when the trailer was in motion. Respondent acknowledged that the under half of the doors on the trailer were kept open while traveling and when stationery [sic]. Tr. at 341. Respondent has used similar trailers to transport animals "hundreds, even thousands" of times.
>
> Tr. at 342.
>
> I accord equal weight to the testimony of Dr. Brunkhorst and Mr. Kollman. Dr. Brunkhorst explained her concerns for the well-being of the animals during transport in Respondent's vehicle. Respondent explained that he had transported animals numerous times without being charged with a violation of the Act or regulations. The inspections of record of

> Respondent's facilities did not disclose a violation of transportation regulations. I find that the evidence is in equipoise and fails to establish a violation of 9 C.F.R. § 3.138.

ALJ's Decision and Order at 29-30.

I conclude the ALJ's finding that the Administrator failed to prove by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.138 on September 11, 2009, is error. Specifically, the ALJ erroneously found the evidence is in equipoise based on Mr. Ramos's testimony that, prior to September 11, 2009, he had transported animals in a similar manner without being charged with a violation of 9 C.F.R. § 3.138. Mr. Ramos's prior uncharged violations of 9 C.F.R. § 3.138 are not relevant to the issue of whether Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.138 on September 11, 2009.[44] Therefore, I find the Administrator proved by a preponderance of the evidence that Mr. Ramos violated 9 C.F.R. §§ 2.100(a) and 3.138.

J. Sanctions for Violations of the Animal Welfare Act and the Regulations

The ALJ assessed Mr. Ramos a $5,000 civil penalty for his violations of 9 C.F.R. § 2.131(b)(1).[45] The Administrator contends the ALJ found Mr. Ramos mishandled an elephant in violation of 9 C.F.R. § 2.131(b)(1) over a two-day period, but erroneously assessed only a single civil penalty.[46] The Administrator correctly states the Animal Welfare Act

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[44] Pearson, 68 Agric. Dec. 685, 726 (U.S.D.A. 2009) (stating APHIS' failure to cite the respondent for previous violations of the Animal Welfare Act and the Regulations does not absolve the respondent from being held accountable for current violations of the Animal Welfare Act and the Regulations), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); The International Siberian Tiger Foundation, 61 Agric. Dec. 53, 94 (U.S.D.A. 2002) (stating a failure to cite the respondents during a routine facility inspection does not constitute approval of the respondents' methods of exhibition on other occasions); Davenport, 57 Agric. Dec. 189, 209 (U.S.D.A. 1998) (stating, while the respondent escaped citation for a previous violation of the Regulations, he cannot use that mistake to avoid being held accountable for later violations of the Regulations), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998).

[45] ALJ's Decision and Order at 32.

[46] The Administrator asserts the ALJ found Mr. Ramos violated 9 C.F.R. § 2.131(b)(1) on November 13-14, 2008 (Administrator's Appeal Pet. ¶ IIIA3 at 38); however, the ALJ

provides that each violation and each day during which a violation continues shall be a separate offense and correctly concludes Mr. Ramos committed two violations of 9 C.F.R. § 2.131(b)(1) (Administrator's Appeal Pet. ¶ IIIA3 at 38). However, the ALJ does not state that Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) over a two-day period constitute a single violation of the Regulations or that she assessed the $5,000 civil penalty for a single violation of 9 C.F.R. § 2.131(b)(1). Therefore, I reject the Administrator's contentions that the ALJ erroneously concluded Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) over a two-day period constitute a single violation of the Regulations and that the ALJ erroneously assessed Mr. Ramos a civil penalty for a single violation of 9 C.F.R. § 2.131(b)(1).

The ALJ considered APHIS's confiscation of Mr. Ramos's elephant when determining the amount of the civil penalty she would assess Mr. Ramos.[47] The Administrator contends the ALJ's consideration of APHIS' confiscation of Mr. Ramos's elephant, when determining the amount of the civil penalty to assess Mr. Ramos, is error (Administrator's Appeal Pet. ¶ IIIA3 at 38-40).

The Animal Welfare Act provides that the factors to be considered when determining the amount of the civil penalty to be assessed are: (1) the size of the business of the person involved, (2) the gravity of the violation, (3) the person's good faith, and (4) the history of previous violations.[48] Therefore, I agree with the Administrator's contention that the ALJ's consideration of APHIS's confiscation of Mr. Ramos's elephant, when determining the amount of the civil penalty to assess Mr. Ramos, is error. However, the ALJ did not indicate the amount by which she reduced the civil penalty based upon APHIS's confiscation of Mr. Ramos's elephant, and I decline to remand this proceeding to the ALJ in order to adjust the civil penalty assessed against Mr. Ramos.

The Administrator further contends the ALJ did not give appropriate weight to the Administrator's recommendation that the ALJ assess Mr.

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found Mr. Ramos violated 9 C.F.R. § 2.131(b)(1) on September 13-14, 2008 (ALJ's Decision and Order at 33).

[47] ALJ's Decision and Order at 32.

[48] 7 U.S.C. § 2149(b).

Ramos a $35,500 civil penalty (Administrator's Appeal Pet. ¶ IIIB at 40-41). The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of a statute are highly relevant to any sanction to be imposed and are generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less than, or different from, that recommended by administrative officials.[49]

The Administrator did not recommend that the ALJ assess Mr. Ramos a $35,500 civil penalty. Instead, the Administrator recommended that the ALJ assess Mr. Ramos a $33,500 civil penalty.[50] The first time the Administrator recommended the assessment of a $35,500 civil penalty is in the Administrator's appeal to the Judicial Officer. Moreover, the Administrator appears to base his recommendation that the ALJ assess Mr. Ramos a $33,500 civil penalty upon the Administrator's contention that Mr. Ramos committed all of the violations alleged in the Complaint. In light of the Administrator's failure to prove all of the violations upon which the Administrator bases his $33,500 civil penalty recommendation, I agree with the ALJ's rejection of the Administrator's civil penalty recommendation.

Mr. Ramos asserts the $5,000 civil penalty assessed by the ALJ for Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) is excessive in light of Mr. Ramos's belief that Ned's exhibition on September 13-14, 2008, would be beneficial to Ned and Dr. Schotman's approval of Ned's exhibition (Mr. Ramos's Response to Appeal Pet. ¶ G at 8).

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[49] Perry, No. 05-0026, 2013 WL 8213618, at *9 (U.S.D.A. Sept. 6, 2013) (Decision as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.); Greenly, No. 11-0072, 2013 WL 8213615, at *14 (U.S.D.A. Aug. 5, 2013) (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), *aff'd per curiam*, No. 13-2882 (8th Cir. Aug. 22, 2014); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988903 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

[50] Complainant's Post Hr'g Br. ¶ IIIB at 5.

The record establishes that Mr. Ramos's belief that Ned would benefit from exhibition on September 13-14, 2008, was unfounded. Mr. Ramos should have realized Ned was in poor condition and should not be used to give rides and perform in a circus. Ned had experienced recurring symptoms of eating dirt, refusing to eat or drink, and obvious loss of weight, and Mr. Ramos should have recognized that Ned's exhibition in April 2008 in Bangor, Maine, had not enhanced Ned's condition. Moreover, Dr. Schotman's approval of Ned's exhibition does not absolve Mr. Ramos of responsibility for his violations of 9 C.F.R. § 2.131(b)(1).

The ALJ could have assessed Mr. Ramos a $20,000 civil penalty for his violations of 9 C.F.R. § 2.131(b)(1) on September 13-14, 2008.[51] I reject Mr. Ramos's contention that the ALJ's assessment of a $5,000 civil penalty for Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) on September 13-14, 2008, is excessive. I conclude the $5,000 civil penalty assessed by the ALJ for Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) is justified by the facts and warranted in law.

The ALJ did not assess Mr. Ramos a civil penalty for operating as a dealer without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), and failing to have an environmental enrichment plan for nonhuman primates, in violation of 9 C.F.R. §§ 2.100(a) and 3.81. Operation as a dealer without an Animal Welfare Act license is a serious violation because enforcement of the Animal Welfare Act and the Regulations depends upon the identification of persons operating as dealers. Nonetheless, based upon the limited period of time during which Mr. Ramos operated as a dealer without an Animal Welfare Act license, Mr. Ramos's belief that he had a grace period in which to dispose of his animals after the effective date of the revocation of his Animal Welfare Act license, and Mr. Ramos's transportation and sale of his animals to only one person, I decline to reverse the ALJ and assess Mr. Ramos a civil penalty for his violations of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c). Further, I find assessment of a civil monetary penalty for Mr. Ramos's violations of 9 C.F.R. §§ 2.100(a), 3.81, and 3.138 is not justified by the facts.

[51] 7 U.S.C. § 2149(b) provides that the Secretary of Agriculture may assess a violator not more than $10,000 for each violation of the Regulations and provides that each violation and each day during which a violation continues shall be a separate offense.

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy,[52] and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude that a $5,000 civil penalty for Mr. Ramos's violations of 9 C.F.R. § 2.131(b)(1) is appropriate and necessary to ensure Mr. Ramos's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

K. Sanctions for Violations of the Secretary of Agriculture's May 10, 2001, Cease and Desist Order[53]

The Animal Welfare Act requires the Secretary of Agriculture to assess any person who knowingly fails to obey a cease and desist order issued by the Secretary of Agriculture a $1,500 civil penalty for each offense.[54] Effective September 2, 1997, pursuant to Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture increased the civil penalty for a knowing failure to obey a cease and desist order from $1,500 to $1,650.[55] The ALJ found imposition of a $1,650 civil penalty for Mr. Ramos's knowing failures to obey the Secretary of Agriculture's May 10, 2001,

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[52] The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms, Linn Cty., Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision as to James Joseph Hickey and Shannon Hansen):

> The sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

[53] On October 2, 2007 and May 10, 2001, the Secretary of Agriculture ordered Mr. Ramos to cease and desist from violating the Animal Welfare Act and the Regulations (Octagon Sequence of Eight, Inc., Agric. Dec. 1093 (U.S.D.A. 2007); Ramos, 66 Agric. Dec. 291 (U.S.D.A. 2001) (Consent Decision) (CX 1)). The Administrator alleges only that Mr. Ramos knowingly failed to obey the Secretary of Agriculture's May 10, 2001 cease and desist order (Compl. ¶ 3 at 2); therefore, Mr. Ramos's failures to obey the Secretary of Agriculture's October 2, 2007 cease and desist order are not at issue in this proceeding.

[54] 7 U.S.C. § 2149(b). Each day during which a knowing failure to obey a cease and desist order continues is a separate offense.

[55] 7 C.F.R. § 3.91(b)(2)(v) (2005); 7 C.F.R. § 3.91(b)(2)(ii) (2006).

cease and desist order "appropriate."[56] The Administrator contends the ALJ's assessment of a $1,650 civil penalty, is error (Administrator's Appeal Pet. ¶ IIIC at 45-48). Mr. Ramos contends no basis for assessment of a civil penalty exists, as he did not knowingly fail to obey the Secretary of Agriculture's May 10, 2001, cease and desist order (Mr. Ramos's Resp. to Appeal Pet. ¶ G at 8).

Mr. Ramos committed thirty-seven violations of the Animal Welfare Act and the Regulations.[57] The record establishes Mr. Ramos knew of the existence of the Secretary of Agriculture's May 10, 2001, order that he cease and desist from violations of the Animal Welfare Act and the Regulations when he committed the violations of the Animal Welfare Act and the Regulations found in this proceeding.[58] Further, Mr. Ramos knew of facts that constituted the violations of the Animal Welfare Act and the Regulations found in this proceeding.[59] Therefore, I conclude Mr. Ramos "knowingly" failed to obey the Secretary of Agriculture's May 10, 2001, cease and desist order.

The Animal Welfare Act provides that the Secretary of Agriculture "shall" assess a civil penalty against any person who knowingly fails to obey a cease and desist order. The word "shall" is ordinarily the language of command and leaves no room for discretion,[60] and I have

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[56] ALJ's Decision and Order at 32.

[57] Specifically, Mr. Ramos committed thirty-three violations of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), as alleged in paragraph 5 of the Complaint; two violations of 9 C.F.R. § 2.131(b)(1), as alleged in paragraph 6 of the Complaint; one violation of 9 C.F.R. §§ 2.100(a) and 3.81, as alleged in paragraph 10 of the Complaint; and one violation of 9 C.F.R. §§ 2.100(a) and 3.138, as alleged in paragraph 12 of the Complaint and the Notice of Correction to Complaint.

[58] Mr. Ramos signed *Ramos*, 60 Agric. Dec. 291 (U.S.D.A. 2001) (Consent Decision) (CX 1 at 5).

[59] *See* Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 467 (5th Cir. 2015) (holding, for the purposes of 7 U.S.C. § 2149(b), "knowingly" requires only that the respondent knew the facts that constituted the unlawful conduct), *remanded on other grounds*.

[60] *See generally* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); Escoe v. Zerbst, 295 U.S. 490, 493 (1935) (same); Ex parte Jordan, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); Lion Raisin, Inc., 62 Agric. Dec. 149, 151-52 (U.S.D.A. 2003) (Remand Order) (stating the word "shall" is ordinarily the language of command and leaves no room for discretion); PMD Produce Brokerage Corp., 60 Agric. Dec. 364, 369-70 (U.S.D.A. 2001)

consistently interpreted the word "shall" in 7 U.S.C. § 2149(b) as requiring the assessment of a civil penalty for each knowing violation of a cease and desist order issued by the Secretary of Agriculture. The United States Court of Appeals for the Fifth Circuit addressed my interpretation, as follows:

> Because the Judicial Officer's interpretation of the AWA is entitled to *Chevron* deference, we consider, first, whether the statute is ambiguous, and, second, whether the Judicial Officer's interpretation is reasonable. *Chevron, U.S.A., Inc.*, 467 U.S. at 843. The word "shall" in statutory language defining agency authority often contemplates permission, not obligation. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (finding precatory a statutory provision stating that violators "shall be imprisoned . . . or fined," and listing other statutes that use "shall" to convey executive discretion). However, we do not focus on the word "shall" in isolation, but rather "follow the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (alteration in original) (internal quotation marks and citation omitted). The penalty provision regarding knowing violations of cease and desist orders may be contrasted with other language in the same statutory section, which provides that violators of the statute or regulations "*may* be assessed a civil penalty by the Secretary of not more than $10,000." 7 U.S.C. § 2149(b) (emphasis added). The contrast suggests a deliberate choice by Congress to make one penalty precatory and the other mandatory. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language

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(Order Den. Pet. to Reopen Hr'g and Remand Order) (same); Borden, Inc., 46 Agric. Dec. 1315, 1460 (U.S.D.A. Sept. 30, 1987) (same), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (U.S.D.A. 1991); Haring Meats & Delicatessen, Inc., 44 Agric. Dec. 1886, 1899 (U.S.D.A. 1985) (same); Great W. Packing Co., 39 Agric. Dec. 1358, 1366 (U.S.D.A. 1980) (same), *aff'd,* No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); Ben Gatz Co., 38 Agric. Dec. 1038, 1043 (U.S.D.A. 1979) (same).

> in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (internal quotation marks omitted)). The statute is at most silent on the question of whether Congress intended to allow executive discretion to impose lighter penalties for violations of cease and desist orders, and the Judicial Officer's contrary interpretation has ample basis to be reasonable. Indeed, that interpretation is consistent with Department regulations, which state: "Civil penalty for a violation of the Animal Welfare Act . . . *has a maximum* of $10,000, and knowing failure to obey a cease and desist order *has* a civil penalty of $1,650." 7 C.F.R. § 3.91(b)(2)(ii) (emphasis added). We defer to the Secretary's reasonable interpretation of the AWA to require a penalty of $1,650 per violation[.]

Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 465-66 (5th Cir. 2015), *remanded on other grounds*. Thus, I am required to assess Mr. Ramos a $1,650 civil penalty for each of his 37 knowing failures to obey the Secretary of Agriculture's May 10, 2001, cease and desist order. Accordingly, I assess Mr. Ramos a $61,050 civil penalty for his knowing failures to obey the Secretary of Agriculture's May 10, 2001, cease and desist order.

IV. FINDINGS OF FACT

1. Mr. Ramos's business is located in Balm, Florida.

2. At all times material to this proceeding, Mr. Ramos operated as an "exhibitor" and/or "dealer," as those terms are defined in the Animal Welfare Act and the Regulations.

3. The Secretary of Agriculture revoked Mr. Ramos's Animal Welfare Act license (license number 58-C-0816), in *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093 (U.S.D.A. 2007). The Secretary of Agriculture's October 2, 2007 order revoking Mr. Ramos's Animal Welfare Act license became effective on October 19, 2009.

4. The Secretary of Agriculture ordered Mr. Ramos to cease and desist from violations of the Animal Welfare Act and the Regulations on May 10, 2001, in *Ramos*, 60 Agric. Dec. 291 (U.S.D.A. 2001) (Consent Decision). The Secretary of Agriculture's May 10, 2001 order that Mr. Ramos cease and desist from violations of the Animal Welfare Act and the Regulations became effective the first day after Mr. Ramos was served with *Ramos*, 60 Agric. Dec. 291 (U.S.D.A. 2001) (Consent Decision).

5. Mr. Ramos did not verbally abuse and harass APHIS inspectors while they performed their duties on November 7, 2008.

6. During the period October 19, 2009 through November 8, 2009, Mr. Ramos operated as a dealer without an Animal Welfare Act license.

7. On or about September 13-14, 2008, Mr. Ramos exhibited an elephant named "Ned" while Ned was in poor physical condition and health.

8. Mr. Ramos did not fail to provide adequate veterinary care to an elephant named "Ned" during the period January 10, 2008 through November 7, 2008.

9. Mr. Ramos did not fail to provide adequate veterinary care to a tiger named "India" on October 29, 2008.

10. Mr. Ramos did not fail to provide adequate veterinary care to a lion named "Saby" on October 29, 2008.

11. On October 29, 2008, Mr. Ramos failed to have a written plan of environment enhancement to promote the psychological well-being of nonhuman primates.

12. Mr. Ramos did not fail to feed an elephant named "Ned" wholesome, palatable food of sufficient quantity and nutritive value, during the period October 29, 2008 through November 7, 2008.

13. On September 11, 2009, Mr. Ramos failed to design and construct the animal cargo space of his primary conveyance to protect the health and ensure the safety and comfort of four tigers and two lions contained in the animal cargo space.

14. Mr. Ramos knowingly failed to obey the Secretary of Agriculture's May 10, 2001, cease and desist order when he violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a), 2.10(c), 2.100(a), 3.81, and 3.138, as found in this proceeding.

15. An order requiring Mr. Ramos to cease and desist from violations of the Animal Welfare Act and the Regulations is justified by the facts.

16. An order assessing Mr. Ramos a $5,000 civil penalty for his September 13-14, 2008, violations of 9 C.F.R. § 2.131(b)(1) is justified by the facts.

17. An order assessing Mr. Ramos a $61,050 civil penalty for his thirty-seven knowing failures to obey the Secretary of Agriculture's May 10, 2001, cease and desist order is justified by the facts.

V. CONCLUSIONS OF LAW

1. The Secretary of Agriculture has jurisdiction in this matter.

2. The Administrator failed to prove by a preponderance of the evidence that, on November 7, 2008, Mr. Ramos verbally abused and harassed APHIS inspectors in the course of their duties, in violation of 9 C.F.R. § 2.4, as alleged in paragraph 4 of the Complaint.

3. The Administrator proved by a preponderance of the evidence that, during the period October 19, 2009 through November 8, 2009, Mr. Ramos operated as a dealer without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), when Mr. Ramos transported and sold thirty-three animals, as alleged in paragraph 5 of the Complaint.

4. The Administrator proved by a preponderance of the evidence that, on September 13-14, 2008, Mr. Ramos exhibited an elephant named "Ned"

while Ned was in poor physical condition and health, in violation of 9 C.F.R. § 2.131(b)(1), as alleged in paragraph 6 of the Complaint.

5. The Administrator failed to prove by a preponderance of the evidence that, between January 10, 2008 and November 7, 2008, Mr. Ramos did not provide adequate veterinary care to an elephant named "Ned," in violation of 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 7 of the Complaint.

6. The Administrator failed to prove by a preponderance of the evidence that, on October 29, 2008, Mr. Ramos did not provide adequate veterinary care to a tiger named "India," in violation of 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 8 of the Complaint.

7. The Administrator failed to prove by a preponderance of the evidence that, on October 29, 2008, Mr. Ramos did not provide adequate veterinary care to a lion named "Saby," in violation of 9 C.F.R. § 2.40(b)(2), as alleged in paragraph 9 of the Complaint.

8. The Administrator proved by a preponderance of the evidence that, on October 29, 2008, Mr. Ramos failed to have a written plan of environment enhancement to promote the psychological well-being of nonhuman primates, in violation of 9 C.F.R. §§ 2.100(a) and 3.81, as alleged in paragraph 10 of the Complaint.

9. The Administrator failed to prove by a preponderance of the evidence that, during the period October 29, 2008, through November 7, 2008, Mr. Ramos did not feed an elephant named "Ned" wholesome, palatable food of sufficient quantity and nutritive value, in violation of 9 C.F.R. §§ 2.100(a) and 3.129, as alleged in paragraph 11 of the Complaint.

10. The Administrator proved by a preponderance of the evidence that, on September 11, 2009, Mr. Ramos failed to design and construct the animal cargo space of his primary conveyance to protect the health and ensure the safety and comfort of four tigers and two lions contained in the animal cargo space, in violation of 9 C.F.R. §§ 2.100(a) and 3.138, as alleged in paragraph 12 of the Complaint and the Notice of Correction to Complaint.

11. Mr. Ramos knowingly failed to obey the Secretary of Agriculture's May 10, 2001, cease and desist order when Mr. Ramos violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a), 2.10(c), 2.100(a), 3.81, and 3.138, as found in this proceeding.

12. An order requiring Mr. Ramos to cease and desist from violations of the Animal Welfare Act and the Regulations is warranted in law.

13. An order assessing Mr. Ramos a $5,000 civil penalty for his September 13-14, 2008, violations of 9 C.F.R. § 2.131(b)(1) is warranted in law.

14. An order assessing Mr. Ramos a $61,050 civil penalty for his thirty-seven knowing failures to obey the Secretary of Agriculture's May 10, 2001, cease and desist order is warranted in law.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Ramos and his agents, employees, successors and assigns, directly or indirectly through any individual, corporate or other device, are ordered to cease and desist from violations of the Animal Welfare Act and the Regulations, and, in particular, shall cease and desist from:

a. operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license issued by the Secretary of Agriculture;

b. failing to handle animals as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort to the animals;

c. failing to have a written plan for environment enhancement adequate to promote the physiological well-being of nonhuman primates; and

d. failing to design and construct animal cargo space in primary conveyances to protect the health and ensure the safety and comfort of live animals contained in the animal cargo space.

Paragraph 1 of this Order shall become effective upon service of this Order on Mr. Ramos.

2. Mr. Ramos is assessed a $66,050 civil penalty. Mr. Ramos shall pay the civil penalty by certified check or money order made payable to the Treasurer of the United States and sent to the following address:

USDA APHIS GENERAL
P.O. Box 979043
USDA APHIS GENERAL
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, USDA APHIS GENERAL within sixty (60) days after service of this Order on Mr. Ramos. Mr. Ramos shall state on the certified check or money order that payment is in reference to AWA Docket No. 13-0342.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Ramos has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Ramos must seek judicial review within sixty (60) days after entry of the Order in this Decision and Order.[61] The date of entry of the Order in this Decision and Order is April 18, 2016.

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[61] 7 U.S.C. § 2149(c).

In re: BETH ANN TINSLEY.
Docket No. 15-0015.
Decision and Order.
Filed January 11, 2016.

AWA.

Sharlene Deskins, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The above-captioned matter involves a complaint filed by the Administrator of the Animal and Plant Health Inspection Service [APHIS], an agency of the United States Department of Agriculture [USDA; Complainant], against Beth Ann Tinsley [Respondent], alleging violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [the Act]. Respondent filed an Answer.

Upon review of the record, I have concluded that there are no material facts in dispute, that Respondent admitted to the allegations, and that a Decision on the Record is appropriate. The instant decision[1] is based upon consideration of the pleadings, arguments and explanations of the parties, and controlling law.

I. ISSUES

1. Whether Respondent violated the AWA, and if so;

2. The nature of sanctions, if any, that should be imposed.

II. STATEMENT OF THE CASE

[1] In this Decision & Order, Complainant's evidence shall be denoted as "PX-[exhibit #],"and Respondents' evidence shall be denoted as "RX-[exhibit number]." Exhibits admitted to the record *sua sponte* shall be denoted as "ALJX-[exhibit number]."

A. Procedural History

On October 23, 2014, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges of the United States Department of Agriculture [OALJ] alleging violations of the AWA. On November 24, 2014, Respondent filed correspondence with handwritten notations that I deem to be an answer[2], together with some documents that I hereby identify as RX-1. By order issued February 27, 2015, I set deadlines for the parties to exchange evidence and exhibit and witness lists, and to file copies of the lists with the Hearing Clerk. By notice filed May 26, 2015, counsel for Complainant advised that submissions had been exchanged and lists were filed. Respondent did not file lists.

By Order issued October 8, 2015, I concluded that an order on the record was appropriate and directed the parties to file all documents. On October 29, 2015, Complainant filed CX-1 through CX-7. On November 19, 2015, Complainant filed a motion for adoption of its proposed Decision and Order on the Record. Respondent did not file any additional evidence and did not file a response to Complainant's motion.

B. Statutory and Regulatory Authority

The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. § 2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7 U.S.C. § 2151. The Act and regulations fall within the enforcement authority of the Animal Plant Health Inspection Service [APHIS], an agency of USDA, that is authorized to regulate and inspect AWA licensees to determine compliance with the AWA.

The AWA provides that sanctions may be assessed for violations of the Act. 7 U.S.C. § 2149. Sanctions may consist of civil money

[2] Respondent made hand-written notations on a copy of the Complaint and the letter forwarding the complaint, and attached documents.

penalties of up to $10,000 per violation, license suspension or revocation, and an order to cease and desist from further violating the Act.

C. Summary of the Evidence

1. Documentary Evidence

RX-1 Statements of Respondent on Complaint and other written statements

RX-2 Medical records from Respondent's hospitalization (these documents are filed under seal to protect Respondent's privacy)

RX-4 Handwritten announcement of intent to close the business and sell animals

RX-5 APHIS Form 7006 dated March 12, 2011, Record of Disposition of Dogs and Cats, and attached auction documents

CX-1 Inspection Report dated July 21, 2010

CX-2 Photographs from inspection of July 21, 2010

CX-3 November 13, 2010, Affidavit of Respondent Beth Ann Tinsley

CX-4 Veterinary-care forms

CX-5 Inspection Report of July 21, 2010 with notations from Respondent

CX-6 Copy of AWA license No 48-A-207 issued to Respondent Beth Ann Tinsley, expiration date January 30, 2011

CX-7 Respondent Beth Ann Tinsley's January 13, 2010 application to renew AWA license

IV. DISCUSSION

At all times relevant to this adjudication, Respondent operated a breeding business that brought her within the scope of the AWA, and that required her to be licensed and her premises to be inspected by APHIS. Respondent held a valid AWA license on July 21, 2010, when she refused access to her facility to allow inspection by APHIS Inspector Karl Thorton. Respondent admitted that she had directed Mr. Thorton to leave her premises and interrupted the inspection. She admitted using vulgar expletives in her conversation with Mr. Thorton, and attributed her conduct to her physical condition, for which she had been hospitalized. CX-3; CX-5; RX-1. Respondent also admitted that she had prevented Mr. Thorton from inspecting her records on July 21, 2010. CX-3; CX-5; RX-1.

Respondent further admitted that some of her animals needed to be groomed, and she contended that she took care of this. An AKC Compliance Report dated June 8, 2011, found her in compliance with AKC rules and regulations. RX-3.

Respondent contends that she has closed her business. Documents support that Respondent sold or otherwise disposed of her animals in March 2011. RX-4 and RX-5.

There is no dispute that Respondent interfered with APHIS officials, failed to properly groom dogs in a manner establishing adequate veterinary care, and failed to provide access and inspection of records and property to APHIS officials. Complainant has met its burden of proving that Respondent willfully violated the AWA and regulations.

A. Sanctions

APHIS has recommended that Respondent be ordered to cease and desist from violating the Act and regulations and that her license be revoked. It is not entirely clear from the record before me that Respondent currently holds a valid AWA license. However, in an abundance of caution, I find it appropriate to impose the sanctions recommended by APHIS, as they are supported by the record.

V. FINDINGS OF FACT

1. Respondent Beth Ann Tinsley is an individual with a mailing address in [redacted].*

2. At all times relevant to this adjudication, Respondent operated as a Class A licensee under the AWA, as defined by 9 C.F.R. § 1.1.

3. Respondent's license is No. 48-A-2077.

4. On July 21, 2010, Respondent interrupted an inspection of her facility by an APHIS inspector, and refused to allow APHIS to inspect her animals, facilities and records.

5. The brief inspection that the inspector had conducted revealed four dogs with matted fur.

VI. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.

2. There is no factual dispute involving the material issue in this matter and no need for an oral hearing in this matter.

3. Respondent's refusal to allow APHIS to inspect her animals, facilities, and records constitutes a willful violation of the AWA, 7 U.S.C. § 2146, and the regulations set forth at 9 C.F.R. § 2.126.

4. Respondent's failure to maintain a program of adequate veterinary care constitutes a willful violation of 9 C.F.R. § 2.40, as at least four dogs demonstrated lack of daily observation and care.

5. Respondent's interference with APHIS inspectors, and her threatening and abusive conduct to an APHIS employee constitutes a willful violation of 9 C.F.R. § 2.4.

* Personal privacy information has been redacted by the Editor.

ORDER

Beth Ann Tinsley and her agents, employees, successors, and assigns, directly or indirectly through any individual, corporate or other device, is hereby ORDERED to cease and desist from further violations of the Act and controlling regulations.

Respondent's AWA license is hereby revoked to further the purposes of the Act, as explained in this Decision and Order. Respondent is permanently disqualified from applying for or obtaining a license under the Animal Welfare Act. Respondent may not individually, through any partnership or through any corporate device engage in any activities requiring a license under the Animal Welfare Act.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

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In re: TIMOTHY L. STARK, an individual.
Docket No. 15-0080.
Decision and Order.
Filed January 11, 2016.

AWA.

Colleen A. Carroll, Esq. for Complainant.
David E. Mosley, Esq. for Respondent.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER DENYING AND GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

The instant matter was initiated by an order to show cause why Timothy L. Stark's [Respondent] exhibitor's license under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* [AWA or the Act] should not be terminated [Show Cause Order]. The Show Cause Order[1] was filed by the Administrator of the Animal and Plant Health Inspection Service of the United States Department of Agriculture [APHIS; USDA] with the Hearing Clerk for USDA's Office of Administrative Law Judges [OALJ].

This matter is ripe for adjudication, and this Decision and Order[2] is based upon the documentary evidence and arguments of the parties, as I have determined that summary judgment is an appropriate method for disposition of this case.

II. ISSUE

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of either USDA or Respondent, thereby mooting the need for a hearing in this matter.

III. PROCEDURAL HISTORY

On February 25, 2016, counsel for APHIS filed with the Hearing Clerk for the Office of Administrative Law Judges (OALJ) [Hearing Clerk] an Order to Show Cause Why Respondent's Animal Welfare Act License Should Not Be Terminated [Show Cause Order]. On March 23, 2015, Respondent filed an answer and motion for a hearing. On March 25, 2015, Respondent filed a Motion to Dismiss the Show Cause Order. On April 15, 2015, USDA filed an objection to Respondent's Motion. By Order issued April 21, 2015, I dismissed the Motion.

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[1] Pursuant to the Rules of Practice Governing Formal Adjudications Before the Secretary, an order to show cause filed by the USDA is tantamount to a complaint.

[2] In this Decision and Order, documents submitted by USDA shall be denoted as "CX-#," and documents submitted by Respondent shall be denoted as "RX-letter."

On April 16, 2015, I held a telephone conference with counsel for the parties, during which I was informed that each party anticipated filing motions for summary judgment. On June 3, 2015, USDA filed a Motion for Summary Judgment. On July 28, 2015, Respondent filed a Motion for Summary Judgment together with supporting documents.

On October 6, 2015, additional counsel for Respondent entered an appearance. Original counsel did not withdraw; therefore, all pleadings, orders, and other documents shall be served on both counsel.

All documents are hereby admitted to the record.

IV. LEGAL STANDARDS

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [the Rules], set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric*., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); FED. R. CIV. P. 56(c)). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading but

must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. § 2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. § 2151. The Act and regulations fall within the enforcement authority of the Animal Plant Health Inspection Service [APHIS], an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA. The AWA authorizes the Secretary of USDA to "issue licenses . . . in a manner as he may prescribe" (7 U.S.C. § 2133) and to "promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the Act]" (7 U.S.C. § 2151).

Pursuant to 9 C.F.R. § 2.11(a), A license shall not be issued to any applicant who:

> (5) Is or would be operating in violation or circumvention of any federal, State or local laws; or (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department or other government agencies, or has pled *nolo contendre* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals

> or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §2.11(a)(5) and (6).

Pursuant to 9 C.F.R. § 2.5, Duration of license and termination of license, an AWA license shall be valid unless "the license has expired or been terminated." 9 C.F.R. § 2.5(a)(3).

V. POSITIONS OF THE PARTIES

USDA contends that because Respondent pled guilty on August 17, 2007 of violating the Endangered Species Act (16 U.S.C. §§ 1538(a)(1)(E); 1540(b)(1)) by knowingly, intentionally, and unlawfully in 2004, selling, receiving, transporting, and shipping in interstate commerce an ocelot, which is listed among those species identified as endangered in a list of species published at 50 C.F.R. § 17.11(h), Respondent's AWA license should be terminated.

Respondent does not deny the factual underpinnings of the matter but maintains that at the time of the illegal sale of the ocelot, he held AWA Class B Dealer License number 32-B-0175. In 2006, Respondent applied for an exhibitor's license, and USDA issued him a license. The conviction did not involve a violation that occurred during the period when Respondent's exhibitor's license (number 32-C-0204, issued on November 27, 2007) was in effect, although the conviction was entered shortly before that license was issued by APHIS. Therefore, Respondent maintains, any action by USDA should have affected the license in effect at the time of illegal sale.

Respondent further maintains that the conviction did not relate to a law or regulation pertaining to animal cruelty and occurred years ago and that APHIS did not make a timely determination that he was unfit to be licensed due to the illegal sale of the ocelot. APHIS has repeatedly renewed his license after first issuing it in 2007.

VI. DISCUSSION

The fact that, in August 2007, Respondent entered into a guilty plea that led to his conviction for selling a protected animal in interstate commerce in violation of the Endangered Species Act is undisputed and admitted by Respondent. CX-2; RX-B. It is also undisputed that the Administrator of APHIS has authority to terminate a license to a licensee who is found to have violated a law pertaining to the transportation and ownership of animals where "the Administrator determines that the issuance of a license would be contrary to the purposes of the Act." 9 C.F.R. § 2.11(a)(6).

Considering the evidence in a light most favorable to Respondent, I find that USDA has not demonstrated that Respondent's AWA license should be terminated. The evidence fails to establish that the Administrator of APHIS determined that the issuance of a license to Respondent would be contrary to the purposes of the Act. In fact, APHIS has renewed Respondent's AWA license following his conviction, most recently in November, 2014.[3] RX-A. There has been no allegation made, and no evidence presented, that Respondent failed to report his conviction, and I accord substantial weight to Respondent's declaration that the animal was not harmed in any way. *See* Aff. at ¶ 9, RX-B.

The evidence also fails to support USDA's allegation that Respondent "…has been found to have harmed the animals in his custody…" Show Cause Order ¶ 4. Respondent's guilty plea clearly limits his violation of the Endangered Species Act in October 2004 to one count in which Respondent agreed that he "did knowingly, intentionally and unlawfully receive, transport, and ship in interstate commerce an endangered species, namely, an ocelot he sold to an individual from Texas in the course of commercial activity…" CX-2 at ¶ 1. In addition, samples of inspections of Respondent's facility conducted by APHIS over several years did not disclose that animals were harmed by Respondent. RX-C. Since APHIS has issued an AWA license to Respondent many times in years following his conviction for conduct occurring in 2004, and since the Show Cause Order rests solely upon that action, I find that it would be arbitrary and capricious for APHIS to now terminate Respondent's license for conduct occurring more than ten years in the past with no

[3] Neither party presented evidence regarding whether APHIS renewed Respondent's license in 2015.

additional evidence impugning Respondent's fitness to hold an AWA license.

USDA has failed to carry the burden of proof in this matter. Accordingly, I find it appropriate to DENY USDA's Motion for Summary Judgment. By denying Complainant's Motion for Summary Judgment, I have tacitly granted Respondent's Motion for Summary Judgment in his favor.

VII. FINDINGS OF FACT

1. Respondent Timothy L. Stark is an individual with a mailing address in [redacted].*

2. Respondent is an exhibitor, as that term is defined in the Act and Regulations, and since November 2007 has held a Class C Exhibitor license under the AWA, #32-C-0204.

3. In October 2004, Respondent transferred possession of an ocelot to an individual in Texas while holding a Class B license under the AWA.

4. An ocelot is an animal that is listed as protected by the Endangered Species Act.

5. Respondent's sale and transfer of the ocelot constituted commercial interstate activity prohibited by the Endangered Species Act.

6. In August, 2007, Respondent pled guilty to that offense and was convicted of violating the Endangered Species Act.

7. Despite his conviction, APHIS has routinely renewed Respondent's valid license under the AWA.
8. The instant action to terminate Respondent's AWA license rests solely on his conviction for an offense that occurred more than ten years ago.

* Personal privacy information has been redacted by the Editor.

9. There is no evidence that Respondent's actions harmed the ocelot that was transferred, or any other animal.

VIII. CONCLUSIONS

1. The Secretary, USDA, has jurisdiction in this matter.

2. The material facts involved in this matter are not in dispute, and the entry of summary judgment in favor of Respondent is appropriate.

3. The denial of summary judgment to Complainant USDA is appropriate, as USDA has failed to establish how Respondent could be determined unfit to hold an AWA license for an old conviction, which did not prevent APHIS from repeatedly thereafter issuing him the license which USDA seeks to terminate.

ORDER

USDA has failed to establish that Respondent is unfit to hold an AWA license for a conviction pertaining to the transfer of an animal protected by the Endangered Species Act more than ten years ago. APHIS shall issue Respondent's AWA Exhibitor's license if it has been timely submitted for renewal and if all fees have been paid.

This Decision and Order shall be effective thirty-five (35) days after this decision is served upon the Petitioner unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

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COMMODITY PROMOTION, RESEARCH, AND INFORMATION ACT

COURT DECISIONS

RESOLUTE FOREST PRODUCTS, INC. v. USDA.
No. 14-2103 (JEB).
Court Order.
Filed February 2, 2016.

CPRIA – APA – *De minimis* quantity – Domestic manufacturers – Exemption from check-off participation – Lumber Checkoff Order – Softwood-lumber market.

[Cite as: No. 14-2103 (JEB), 2016 WL 1714312 (D.D.C. Feb. 2, 2016)].

Previously the Court ordered the Department to file a memorandum explaining its reasoning for selecting a 15-million-board-feet exemption as the threshold for the Softwood Lumber Checkoff Order; the below Order was issued in response to the Department's memorandum. Noting several numerical discrepancies in the Department's estimates, the Court concluded that it needed further clarification by the Department before it could rule on whether the 15-million-board-feet exemption was an arbitrary and capricious determination violating the Administrative Procedure Act. The Court ultimately ordered the Department to provide additional accounting and verification of estimates in order to confirm the underlying data that was relied upon to select the *de minimis* exemption threshold.

United States District Court,
District of Columbia.

ORDER

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, DELIVERED THE ORDER OF THE COURT.

Plaintiff Resolute Forest Products, Inc. here challenges the U.S. Department of Agriculture's rulemaking process related to its Softwood Lumber Checkoff Order under the Commodity Promotion, Research, and Information Act, alleging violations of both the Administrative Procedure Act and the U.S. Constitution. After both parties filed cross-motions for summary judgment on the administrative record, this Court in its September 9, 2015, Memorandum Opinion and separate Order granted Defendants' motion on all APA counts but one, which it

remanded without vacatur to the USDA. *See Resolute Forest Products, Inc. v. U.S. Dep't of Agric.,* No. 14–2103, 2015 WL 5501830 (D.D.C. Sept. 9, 2015). Plaintiff in that count challenged, among other things, the selection of 15 million board feet by the USDA's Agricultural Marketing Service (AMS) as the "de minimis quantity" of softwood lumber to be exempted from the Softwood Lumber Checkoff Order. *See id.* at *14-17; *see also* 7 U.S.C. § 7415(a) ("An order issued under this subchapter may contain—(1) authority for the Secretary to exempt from the order any de minimis quantity of the agricultural commodity otherwise covered by the order....").

In its Opinion, the Court found that the Department's initial summary-judgment pleadings had not adequately provided a reasoned basis for the Secretary's selection of the 15–million–board–feet exemption. Because the Court itself identified evidence in the administrative record that *might* provide a documented basis to support it, however, the Order remanded without vacatur to the USDA to provide a more "reasoned and coherent treatment of the decision...." *Resolute Forest Products,* 2015 WL 5501830, at *19. Complying, the Department provided a Memorandum from Rex A. Barnes, Associate Administrator, AMS. *See* Notice (ECF No. 26), Exh. A (Memorandum re: Additional Explanation for the Exemption Threshold in the Softwood Lumber Checkoff Order) ("Memorandum"). Dissatisfied even with this explanation, however, Plaintiff filed a Reply (ECF No. 28) arguing that the USDA's reasoning for selecting the 15–million–board–feet exemption remains arbitrary and capricious and in violation of the APA.

I. DISCREPANCIES IN ESTIMATES

Having reviewed the parties' latest pleadings and exhibits, the Court notes several numerical discrepancies that it has been unable to resolve on its own. It will thus request clarification from the USDA before ruling on the exemption issue.

One of Resolute's central objections is that the USDA and the Blue Ribbon Commission – the body that proposed the Softwood Lumber Checkoff Order and that now oversees it – provided significantly different estimates of the total number of softwood-lumber producers and importers, as well as the number that would be covered by the 15–

million–board–feet exemption. *See* Reply at 8–9. These estimates were important because, according to the USDA, the 15–million–board–feet quantity was selected as "de minimis" on the bases that it would both minimize the "free rider implications" of industry participants who do not pay into the order but reap its benefits and also limit "the impact of program requirements on small businesses." Mem. at 2. If so, then central to satisfying the Department's own stated *de-minimis*-quantity selection criteria are reliable estimates of the total number of market participants exempted, the number of small businesses exempted, and the percentage so exempted.

More specifically, the BRC, when proposing the Checkoff Order, estimated that with a 15–million–board–feet threshold, 257 out of 664 U.S. and Canadian softwood-lumber "companies" (presumably, manufacturers and importers) would be exempt from the Order because their production capacity did not exceed that number. *See* Letter from Jack Jordan, BRC Chairman, to Robert C. Keeney, Deputy Administrator, USDA, AMS (Feb. 16, 2010), Attach. B ("Overview, Justification, and Objectives for a National Research and Promotion Program For Softwood Lumber") at 11 (AR1360). In contrast, the USDA in its April 2011 notice of proposed rulemaking broke out its estimates based on separate measures of U.S. domestic manufacturers and foreign importers. As to the former, it estimated that 232 U.S. manufacturers would be exempt out of a total of 595, while 780 importers would be exempt out of a total of 883. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed.Reg. 22,757, 22,767 (Apr. 22, 2011). Combined, the USDA estimated that 1,012 softwood-lumber companies would be exempted out of 1,478 total. *Id.*

The USDA responds to Plaintiff's objections by stating that the above disparity is due to estimates that "dealt with different periods of time and [that] were based on difference sources of data." Resp. (ECF No. 29) at 3. It claims that whereas the USDA averaged both Forest Service and Customs and Border Protection annual figures for the years 2007, 2008, and 2009, the BRC used only a 2007 estimate based solely on Forest Service data. *See id.* Yet in attempting on its own to reconcile the disparity between the BRC and USDA estimates through their underlying data sources, the Court believes that both the USDA and the

BRC derived at least their *U.S.* estimates from the *same* report, a 2009 joint-USDA-Forest-Service research paper. *See* 76 Fed.Reg. at 22,767 n.14 (citing Henry Spelter, David McKeever & Daniel Toth, *Profile 2009: Softwood Sawmills in the United States and Canada,* FPL–RP–659 (Oct.2009) *("Profile* 2009")); Overview, Justification, and Objectives at 4 (AR1353) (stating that "data and much of the information in this application has been compiled from" *Profile 2009,* referenced there as "Reference D"). The Court now looks at each estimate separately to explain why it has had difficulty reconciling the figures.

A. USDA Estimates

Beginning with the USDA's estimate, the Court believes it has identified what appears to be a misreporting by the agency of the data contained in the *Profile 2009* report. While the USDA estimated in its April 2011 notice of proposed rulemaking that there was "an average of 595 domestic manufacturers of softwood lumber in the United States annually," 76 Fed.Reg. at 22,767, this calculation seems to have confused business entities with *sawmills.* In reporting its estimate of 595 domestic manufacturers, the USDA stated that this "number represents separate business entities [where] ... one business entity may include multiple sawmills." *Id.* Yet for that estimate the USDA cited a page of the USDA/Forest Service report that makes clear that the estimates "show past and current capacity of *sawmills"* – not entities. *See id.* at n.14; *Profile 2009* at 15 ("The following maps and tables show past and current capacity of sawmills and the availability of timber, by county, in the vicinity of these mills....").

To verify this, the Court itself totaled all U.S. *sawmills* specified across 20 tables listed in that report's appendix for the years 2007, 2008, and 2009, which when averaged yielded the same numerical value that the USDA had cited in its notice for *entities,* not sawmills (approximately 595.33). *Seeinfra* Table 1; *see also Profile 2009,* App. Confusingly, the same approach for calculating Canadian sawmills yielded an annual average of 348.67 sawmills for the years 2007–2009, *id.,* far fewer than the 883 "importers" the USDA had estimated in its April 2011 notice. *See* 76 Fed.Reg. at 22,767. This may be because the Department relied on "Customs data" for the latter figure, *see id.,* but without a citation to that underlying source, the Court was unable to

confirm this. Either way, the USDA–Forest Service estimate of Canadian *sawmills* (approximately 348) is far fewer than the 883 importers the USDA estimates. This disparity is disconcerting on its face, since there should be at least as many sawmills as entities, and certainly not fewer. Nor is the disparity likely explained by non-Canadian imports. Elsewhere in its notice of proposed rulemaking, the USDA stated that "imports from Canada ... compris[e] about 94 percent of total imports." *Id.* at 22,759.

B. BRC Estimates

Because the estimates provided by the *agency* in its April 2011 notice of proposed rulemaking do not seem to be substantiated by the underlying data it relied upon, the Court also examined the data provided by the BRC in the softwood-lumber checkoff proposal it sent to the USDA on February 16, 2010. In that proposal, the BRC provided estimates of the total number of companies and the percentage of these companies that would be exempt under the proposed 15–million–board–feet threshold. *See* Overview, Justification, and Objectives (AR1353–64). According to that document, in selecting 15 million board feet as the *de minimis* figure the BRC estimated that 257 out of 664 companies would be exempt. Those exempted entities were estimated to have a combined production capacity of only 1,861 million board feet out of the industry's total capacity of 74,921 million board feet, or 2.5% of total capacity. *See id.* at 11 (AR1360). The BRC also estimated that if the first 15 million board feet were exempted for *all* companies, 11.3% of total production capacity would be exempted. *See id.* (It did not provide the accompanying estimate in total million board feet that would be exempted.)

Once again, however, the Court was unable to verify this estimate on the basis of the joint USDA–Forest Service *Profile 2009* report, which the BRC cited in preparing its own estimates. *Id.* at 4. As stated above, the BRC's estimate for combined U.S. and Canadian production capacity in 2007 was 74,921 million board feet, *id.* at 10, or approximately 176.8 million cubic meters of lumber, which the Court understands to be the other common unit of measure for softwood lumber. The Court relied onConvert-Me.com, *see* http://www.convert-me.com/en/convert/volume/, to convert estimates between cubic meters and meter board feet because the joint USDA–Forest Service *Profile*

2009 Report largely provides its calculations in cubic meters of lumber. The Court was nonetheless unable to locate this number in either unit measure in the *Profile 2009* report that the BRC appears to have relied upon. *See Profile 2009* at 1–14. According to that report, combined U.S. and Canadian production capacity for 2007 was estimated at 188.1 million cubic meters of softwood lumber, or 79,710 million board feet, not 74,921 million board feet as reported by the BRC in its proposal. The Report's estimate for 2008 appears much closer, at 175.5 million cubic meters (or roughly 74,370 million board feet). Nevertheless, the BRC claimed to rely on 2007 estimates. And, because the *Profile 2009* Appendix includes estimates of the number of *sawmills* in the U.S. and Canada but no straightforward estimate of *entities,* the Court was unable to determine whether the USDA–Forest Service estimated total of 976 sawmills in the United States and Canada for 2007 constituted 664 companies with a total estimated production capacity of 74,921 million board feet, as the BRC estimated in its proposal.[1] *See* Overview, Justification, and Objectives at 11 (AR1360). This is to say nothing of the BRC's more specific estimate that 257 companies with 1,861 million board feet of production capacity would be entirely exempt from the checkoff order; nowhere in the *Profile 2009* report could the Court determine how this figure was derived. *See id.*

II. CONCLUSION

To be clear, the Court's concern is not that the USDA and BRC estimates differ, nor does it wish to nitpick the differences between them. Given the complexity of measuring the size and scale of a large and dynamic international industry, it is understandable that estimates may vary year to year and source to source. Rather, the Court simply seeks assurance that some verifiable source of data accurately depicted the softwood-lumber market and supported the selection of 15 million board feet as the appropriate *de minimis* quantity. The Court in particular seeks

[1] The Appendix does specify which entity owns each sawmill, but because many entities appear to own multiple sawmills, and because some entities went by "former name[s]" or do business as another entity, the Court was not confident it could accurately derive a precise number of entities from the list of 976 U.S. and Canadian sawmill entries included in the 40–page appendix. Seeinfra Table 1; Profile 2009, App. I.

to confirm the estimate that fully exempted companies would produce 2.5% of total production capacity and that the exemption would exclude a total of 11.3% of the production capacity of the U.S. and Canadian softwood-lumber market from the Checkoff Order.

The BRC in its proposal stated that its reliance on the *Profile 2009* report was "supplement[ed] ... with an overview of the economics of softwood lumber, information about imports from other overseas sources which participate in the U.S. market, and information about encroachment on wood markets by competing products." *Id.* at 4 (AR1353). It is possible, then, that the BRC's estimates for "Actual U.S. Consumption 2003–2009" and "Impact of Exemption on Check-off Participation: Capacity Removed from Assessment," *see id.* at 11 (AR1360), may also draw on those other sources. The Court seeks to confirm and verify the underlying data that the BRC and/or the USDA rationally relied upon when selecting the *de minimis* exemption threshold.

The Court, accordingly, ORDERS that by February 16, 2016, the USDA shall provide:

> 1. An account of the BRC's "Actual U.S. Consumption 2003–2009" estimate on page 11 of its Overview, Justification, and Objectives for a National Research and Promotion Program For Softwood Lumber (AR1360), and verification of this estimate based on its underlying source or sources;
>
> 2. An account of the BRC's "Impact of Exemption on Check-off Participation: Capacity Removed from Assessment" estimate on page 11 of the same document, and verification of this estimate based on its underlying source or sources; and
>
> 3. Verification via underlying data of the estimates provided in the agency's notice of proposed rulemaking (Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed.Reg. 22,757 (Apr. 22, 2011) concerning the number and

percentage of softwood-lumber market participants exempted from the checkoff order at the 15–million–board–feet threshold.

IT IS SO ORDERED.

Table 1: Estimated Softwood Lumber Sawmills, U.S. & Canada, 2007–2009 (cited by USDA)

	Region	2007	2008	2009	2007-09 Average
US	Alabama & Mississippi	85	83	82	
C	Alberta	31	30	28	
US	Arizona, Colorado, New Mexico, South Dakota, Utah, Wyoming	24	23	21	
US	Arkansas, Louisiana, Oklahoma, Eastern Texas	68	68	61	
C	British Columbia-Coast	35	32	30	
C	British Columbia-Interior	87	81	78	
US	Northern California	28	26	26	
US	Florida & Georgia	62	60	57	
US	Idaho & Montana	40	39	35	
US	Maine, New Hampshire, Vermont	55	54	53	

C	Manitoba & Saskatchewan	13	43	12	
C	Maritime Provinces & Newfoundland	48	42	37	
US	Maryland & Virginia	35	34	33	
US	Michigan, Minnesota, Wisconsin	29	29	27	
US	New York	15	15	15	
US	North & South Carolina	65	62	62	
C	Ontario	36	36	37	
US	Oregon	60	60	56	
C	Quebec	112	105	103	
US	Washington	48	47	44	
	Total	976	939	897	
	Total US	614	600	572	**595.33**
	Total Canada	362	339	325	348.67

Source: Spelter, McKeever & Toth, Profile 2009, Appendix I

RESOLUTE FOREST PRODUCTS, INC. v. USDA.
No. 14-2103 (JEB).
Memorandum Opinion.
Filed May 17, 2016.

CPRIA – Assessments – Blue Ribbon Commission – *De minimis* quantity – Entities – Exemption estimates – Production capacity – Softwood Lumber Checkoff Order – Shipments – Summary judgment.

[Cite as: No. 14-2103 (JEB), 2016 WL 2885869 (D.D.C. May 17, 2016)].

The Court concluded that the Department's selection of 15-million-board-feet as the *de minimis* quantity for exemption under the Softwood Lumber Checkoff Order was arbitrary and capricious and, therefore, the Checkoff Order was promulgated unlawfully. In so finding, the Court emphasized that the Department's explanation for selecting the particular *de minimis* quantity raised numerous concerns; specifically, the record contained "too many misstatements, unsubstantiated (or incorrect) estimates, and statements contradicted by [its] subsequent litigation positions to support the selection of 15mmbf as the de minimis quantity." The Court held that, where an agency relies upon incorrect or inaccurate data or fails to make a reasonable effort to ensure that it relied upon appropriate data, the agency's decision is arbitrary and capricious and must be overturned.

United States District Court,
District of Columbia.

MEMORANDUM OPINION

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

For the past several years, Plaintiff Resolute Forest Products, Inc. and the U.S. Department of Agriculture have been locked in a struggle over the latter's Softwood Lumber Checkoff Order. That Order requires any softwood-lumber domestic manufacturer or foreign importer who produces or imports more than 15 million board feet (15mmbf) per year to pay a mandatory assessment on all softwood lumber shipped above that amount. Checkoff orders such as this are a kind of compulsory marketing program developed by private parties and overseen by the Department in accordance with the Commodity Promotion, Research and Information Act (the CPRIA), 7 U.S.C. §§ 7411–7425. Apparently unhappy that it must pay assessments under the Order, Resolute lodged a failed administrative protest before an ALJ and then subsequently

brought suit here, raising four constitutional challenges to the Order and six alleged violations of the Administrative Procedure Act.

In its September 9, 2015, Memorandum Opinion, this Court dismissed all but one of Plaintiff's APA challenges. *See Resolute Forest Products, Inc. v. U.S. Dep't of Agric.*, 130 F.Supp.3d 81 (D.D.C.2015). On the sole remaining APA claim (Count V), however, this Court remanded without vacatur to the Department of Agriculture for a reasoned and coherent treatment of its decision to select 15mmbf per year as the threshold amount. Defendants responded with a memorandum and exhibits providing additional explanation for the selection of that figure. *See* ECF No. 26. Although Defendants' second explanation was better than its first, it nonetheless raised as many questions as it answered. Unable to reconcile certain discrepancies within the agency's explanations and the data it presented, the Court remanded again, this time ordering the Department to point to the underlying data sources relied upon in selecting 15mmbf and to explain the discrepancies the Court identified. *See Resolute Forest Products, Inc. v. U.S. Dep't of Agric.*, No. 14–2103, 2016 WL 1714312 (D.D.C. Feb. 2, 2016). The agency responded again with further exhibits and an additional memorandum. *See* ECF No. 33.

After all of the back and forth, the same question remains: was the agency's selection of 15mmbf arbitrary and capricious in violation of the APA? Despite two remand opportunities, Defendants have still not provided a reasonable explanation for selecting that quantity. Nearly every calculation upon which the agency relies has significant mismeasurements or inaccuracies, and many of the agency's explanations across its original rulemaking process, its briefings, and its two responses to the Court's remand orders contradict one another. While APA review does not demand perfection from an agency, the Court here must ineluctably conclude that USDA's promulgation of the Checkoff Order was arbitrary and capricious.

I. BACKGROUND

Because the Court has already addressed many of the substantive and procedural issues of this case in its earlier Opinion, *see Resolute Forest Products*, 130 F.Supp.3d 81, it will focus on those still in contention

here.

A. The Softwood Lumber Checkoff Order

The Softwood Lumber Checkoff Order that Plaintiff challenges here grew out of the softwood-lumber industry's struggles during one of the "worst market [s] in history" after the great recession and the collapse of the housing market at the end of the last decade. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order; Proposed Rules, 75 Fed. Reg. 61,002, 61,005 (Oct. 1, 2010). To prop up the struggling industry, a trade association known as the Blue Ribbon Commission (BRC)—comprising 21 softwood-lumber chief-executive officers and business leaders—submitted its incipient proposal to USDA's Agricultural Marketing Service. *Id.* AMS administers marketing orders under the CPRIA, the statute that governs the proposal, approval, and administration of checkoff orders for a variety of commodity products. *See* 7 U.S.C. § 7412–13. When a proposed order is submitted by "an association of producers" (here, the BRC), the statute instructs the Secretary to "determine[ ] that a proposed order is consistent with and will effectuate the purpose" of the CPRIA. *Id.* § 7413(b)(1)–(2). If he so determines, he then proceeds through the standard notice-and-comment rulemaking process for the proposed order. *Id.* § 7413(b)(2)–(4).

In addition to typical notice-and-comment rulemaking, however, the CPRIA mandates that the Secretary also obtain the approval of "persons subject to assessments" under the order via a referendum. *Id.* § 7413(b)(1). The Secretary may conduct said referendum either before finalizing a proposed checkoff order or else within three years of the first assessments taking place in accordance with it. *Id.* § 7417(b)(2). Crucial to this suit and the present dispute, the Secretary also has the authority to exempt from the order any "de minimis quantity" of the agricultural commodity subject to assessment. *Id.* § 7415(a)(1). And because eligibility to participate in the referendum depends on being "among persons to be subject to an assessment," the de minimis quantity also affects who may vote in a given referendum. *Id.* § 7417(a)(1).

As to the Checkoff Order here, after the Secretary determined that the BRC's proposal would effectuate the purpose of the CPRIA, AMS

announced the proposed rule in the Federal Register, providing notice and seeking comment. *See* 75 Fed. Reg. at 61,012. The agency announced that the proposed Order would provide for initial assessments of $0.35 per thousand board feet shipped within or imported to the U.S., although it could eventually be increased up to $0.50. *Id.* The agency also stated that the proposed de minimis quantity exempted from assessment would be 15mmbf per producer or importer per year, with assessments only applying to amounts shipped or imported by a given producer above that threshold in any given year. *Id.* In determining this assessment price and exemption threshold, the agency also explored what portion of the softwood-lumber industry would pay assessments under the Order and considered several different prices and de minimis quantities. *Id.* at 61,012–13.

As support for its proposed de minimis quantity, the agency determined that a 15mmbf exemption and an assessment of $0.35 per thousand board feet would "generate sufficient income to support an effective promotion program for softwood lumber." *Id.* at 61,013. The agency also noted that the BRC had explored various de minimis exemption thresholds—including 15 million, 20 million, and 30 million board feet—and concluded that the 15mmbf exemption ("a quantity sufficient to build approximately 1,000 homes," *Resolute Forest Products*, 130 F.Supp.3d at 102 (internal citation and quotation marks omitted)) would yield "a deduction of 11.3 percent in assessment income" by reducing the total quantity of softwood lumber to be assessed by that percentage. *See* 75 Fed. Reg. at 61,013. In justifying this exemption quantity, the agency estimated that roughly 61% of domestic manufacturers and about 12% of foreign importers would be subject to the Order. *Id.*

After the agency issued the initial proposed rule, it followed up with a summary of comments received and provided responses to those comments. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed. Reg. 22,757, 22,770–75 (April 22, 2011). As the majority of comments supported the proposed Order, AMS next announced a referendum to approve it, in which all eligible producers and importers could participate. *Id.* at 22,775. Eligibility required manufacturing and shipping of 15mmbf or more between January 1 and December 31, 2010. *Id.* After the May 23–

June 10, 2011, referendum was conducted, AMS announced that 67% of those voting, a group that collectively shipped 80% of the volume of softwood lumber represented in the referendum, had voted in favor of the Order. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed. Reg. 46,185, 46,188, 46,189 (Aug. 2, 2011). Based on this approval, AMS subsequently put the Checkoff Order into effect.

B. Resolute's Challenge

Resolute has opposed the Checkoff Order from the beginning. As Plaintiff imported less than 15 million board feet during 2010, it was ineligible to vote in the referendum, *see In Re: Resolute Forest Products Petitioner*, No. 12–40, 2014 WL 1993757, at *5–6 (U.S.D.A. Apr. 30, 2014), but because it has since begun to import more than that amount, it has had to pay assessments on imports above that threshold since January 2012. *See* Pl. MSJ Reply (ECF No. 21) at 7. Opposing the Checkoff Order, Plaintiff filed a petition with USDA on October 28, 2011, shortly after it went into effect. *See* Compl., ¶ 81. When Resolute did not prevail administratively, it filed suit before this Court in December 2014.

The grist of Plaintiff's challenge is that AMS violated the Administrative Procedure Act in both the rulemaking and referendum process, *id.,* ¶¶ 149–200, and that the CPRIA unconstitutionally delegates executive and legislative authority to private parties and also violates the due-process rights of producers and importers. *Id.*, ¶¶ 123–148. In its September 9, 2015, Opinion, this Court granted summary judgment for the agency on five of Resolute's six APA challenges. *See Resolute Forest Products*, 130 F.Supp.3d at 92–100. Because it remanded without vacatur on the sixth APA claim, the Court, following the doctrine of constitutional avoidance, deferred Resolute's constitutional challenges for a later date. *Id.* at 105.

In its remaining APA challenge (now before the Court), Resolute alleged that the agency acted arbitrarily and capriciously in selecting the 15mmbf "de minimis quantity" under the CPRIA. *See* Pl. Opp./MSJ (ECF No. 15) at 25. Plaintiff especially took issue with the agency's original legal argument that any exemption quantity that would "generate sufficient income to support an effective promotion program" would be a

permissible de minimis quantity because it was "impossible for [AMS] to know the total volume" of softwood lumber produced and shipped. *See* Def. MSJ (ECF No. 13) at 24 (citation and internal quotation marks omitted). Resolute argued that AMS lacked discretion to designate any amount whatsoever as the de minimis quantity and asserted that the Service could not substantiate its reasons for selecting 15mmbf as the de minimis quantity. *See* Pl. Opp./MSJ at 26–27. In essence, it concluded, "AMS accepted the 15 million board foot exemption given to it by the BRC because that threshold was calculated by the BRC to hit the revenue targets that the BRC desired." *Id.* at 27.

The Court shared Plaintiff's concern about the agency's argument that it was "impossible" to know the amount of softwood lumber to be assessed, particularly where considerable record evidence suggested that total volumes of softwood lumber produced and shipped were readily available and, indeed, were relied upon in determining the 15mmbf exemption. *See Resolute Forest Products*, 130 F.Supp.3d at 101 ("At least two documents in the Joint Appendix submitted by the parties suggest such figures were obtainable or had been obtained."). The Court, accordingly, remanded without vacatur to the agency to supply additional explanation as to the data that supported a 15mmbf exemption threshold, as well as the underlying rationale in selecting such a threshold. *Id.* at 103–05. Defendants returned several months later with a memorandum from Rex A. Barnes, AMS Associate Administrator, discussed in greater detail below. *See* First Remand Notice (ECF No. 26), Exh. A.

In the course of examining Barnes's explanation and attached exhibits, the Court was still unable to understand how the sources of data the agency purported to rely upon yielded the estimates it had provided during rulemaking. Heeding the maxim of "if at first you don't succeed, try, try, try again," the Court remanded without vacatur a second time, ordering the agency to provide reassurance that, *inter alia*, "some verifiable source of data accurately depicted the softwood-lumber market and supported the selection of 15 million board feet as the appropriate *de minimis* quantity." *Resolute Forest Products*, 2016 WL 1714312, at *3. The agency responded with a memorandum from Charles W. Parrott, Deputy Administrator of the Specialty Crops Program, as well as additional exhibits. *See* Notice (ECF No. 33), Exh. 1. This, too, proved unsatisfactory to Resolute. *See* Pl. Second Remand Response (ECF No.

35). In any event, with this additional information in hand—the agency's two remand memoranda and attached exhibits—the Court may finally rule on Resolute's remaining APA challenge.

II. LEGAL STANDARD

In the typical case, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C.Cir.2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb*, 433 F.3d at 895. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb*, 433 F.3d at 895.

Although styled Motions for Summary Judgment, the pleadings in this case more accurately seek the Court's review of an administrative decision. Challenges under the CPRIA proceed under the Administrative Procedure Act's familiar "arbitrary and capricious" standard of review. *See* 7 U.S.C. § 7418(b)(1); 5 U.S.C. § 706(2)(A). Because of the limited role federal courts play in reviewing such administrative decisions, the typical Rule 56 summary-judgment standard does not apply to the parties' dueling motions on Resolute's APA claims. *See Sierra Club v. Mainella*, 459 F.Supp.2d 76, 89–90 (D.D.C.2006). Instead, in APA cases, "the function of the district court is to determine whether or not ... the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *See Bloch v. Powell*, 227 F.Supp.2d 25, 31 (D.D.C.2002) (citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C.Cir.1977)).

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "narrow" standard of review—which appropriately encourages courts to defer to the agency's expertise—an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citation and internal quotation marks omitted). "In reviewing agency action under that standard, a court is not to substitute its judgment for that of the agency," *GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 148 (D.C.Cir.2013) (citation and internal quotation marks omitted), nor to "disturb the decision of an agency that has examine[d] the relevant data and articulate[d] ... a rational connection between the facts found and the choice made." *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C.Cir.2013) (internal quotation marks and citation omitted). On the other hand, where the agency has not provided a reasonable explanation for its actions, "[t]he reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (citation and internal quotation marks omitted). A court should nevertheless "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (quoting *Bowman Transp. Inc. v. Arkansas–Best Freight System*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

More specific to Resolute's remaining APA challenge here—a challenge to the Secretary's interpretation of an ambiguous statutory term—"[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, app*lying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear[,] ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " City of Arlington, Tex. v. FCC, —— U.S. ——, 133 S.Ct. 1863, 1868, —— L.Ed.2d —— (2013) (quoting *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). However, "if the statute is silent or ambiguous with respect to the specific issue, the

question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. This latter analysis is colloquially known as "*Chevron* step two." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C.Cir.2011) ("At *Chevron* step two we defer to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation.").

III. ANALYSIS

The Court now turns to the heart of Resolute's remaining APA challenge: that the agency's selection of 15mmbf as the de minimis quantity exempted was arbitrary and capricious. *See* Pl. Opp./MSJ at 25–26. The first step in considering a challenge such as this is to assess the agency's interpretation of the statute itself. Because the Court has already found the statutory term "de minimis quantity" ambiguous, *see Resolute Forest Products*, 130 F.Supp.3d at 102–103, it resumes its analysis at *Chevron* step two: given the ambiguity in the statute, has the agency offered a permissible construction of "de minimis quantity"?

This question, in turn, implicates two separate issues. The Court must first assess whether the agency considered appropriate criteria in determining a viable de minimis quantity to be exempted. Satisfied that it did so, the Court next considers the agency's explanation and evidence supporting its selection of 15mmbf as de minimis in light of the agency's identified criteria.

A. Permissible Interpretation of "De Minimis Quantity"

The Court begins by considering the agency's interpretation of "de minimis quantity" under the CPRIA. As a reminder, Defendants' initial summary-judgment pleadings maintained that because it was "impossible" to know the total quantity of softwood lumber produced—despite evidence to the contrary in the agency's own rulemaking notices—the Secretary's selection of "any" de minimis quantity was permissible under the CPRIA. *Compare* Def. Reply at 23 (" '[i]t's impossible for us to know the total volume' of softwood lumber"), *with* 75 Fed. Reg. at 61,003 ("According to USDA's Forest Service, for 2007–2008, total output (production) of softwood lumber by U.S.

sawmills averaged about 29.5 billion board feet annually."), *and id.* at 61,004 ("According to U.S. Department of Commerce, Census Bureau, Foreign Trade Statistics data, imports of softwood lumber from 2007 through 2009 averaged about 13 billion board feet annually.") (citation omitted). Given the implausibility of the agency's interpretation—in light of the plain meaning of "de minimis" and the appearance of evidence in its rulemaking notices suggesting it was possible to obtain total quantity estimates—the Court remanded "for a reasoned and coherent treatment of the decision to select a 15 million-board-feet-per-year exemption as the 'de minimis quantity' exemption in accordance with" the CPRIA. *See Resolute Forest Products*, 130 F.Supp.3d at 105.

In response to this Order, Defendant provided a memorandum from Rex A. Barnes, Associate Administrator, AMS. Recognizing the problematic nature of its initial litigation position at summary judgment, the agency's memorandum provides a more thorough account of the general criteria it asserts are appropriate in selecting a "de minimis quantity" in accordance with 7 U.S.C. § 7415(a)(1). The agency has not had a prior occasion to articulate how it determines a "de minimis quantity" to be exempted from a proposed checkoff order, nor has a court previously endorsed a particular interpretive approach, so this is a question of first impression.

As the agency noted in its rulemaking notice, "[T]he 1996 Act does not define the term de minimis and USDA is not limited to using the definition of de minimis as specified in another law or agreement. The de minimis quantity is defined for a particular program and industry." 76 Fed. Reg. at 22,772. Because the CPRIA "provides no set methodology or formula for computing a de minimis quantity," the Barnes Memorandum explains that USDA considered several factors in selecting a threshold, including (1) an estimate of the total quantity of the particular agricultural commodity (both quantity assessed and quantity exempted); (2) free-rider implications of a particular quantity; (3) the impact of such a limit on small businesses; and (4) the available funding to support a viable program operating at that exemption threshold. See Barnes Mem. at 3.

From the vantage point of *Chevron* step-two analysis, the question is whether the agency's proposed construction of the ambiguous term—"de

minimis quantity"—is a permissible interpretation. These general factors were not articulated in quite this fashion in the agency's notice of the proposed rulemaking, its response to comments, and in the final regulation implementing it. Given that *Chevron* deference is owed to "the administrative official and not to appellate counsel," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (citation and internal quotation marks omitted), "we give no deference to agency 'litigating positions' raised for the first time on judicial review." *Vill. of Barrington, Ill.*, 636 F.3d at 660. In this case, however, it was legal counsel's position—that it was impossible to know the total quantity of softwood lumber—that the Court found not credible, and the explanation of considerations regarding the selection of a de minimis quantity come from a member of the agency (Rex A. Barnes of AMS), not from legal counsel.

Consideration of the agency's arguments on the first remand regarding its approach to interpreting the ambiguous term is also perfectly acceptable insofar as courts "frequently remand matters to agencies while leaving open the possibility that the agencies can reach exactly the same result as long as they ... explain themselves better or develop better evidence for their position." *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 30 F.3d 1510, 1514 (D.C.Cir.1994). The agency's more robust explanation is entirely the product of this Court's first remand order for a fuller account of the 15mmbf-exemption selection criteria, and so the Court may consider these factors in assessing whether the agency's choice of the de minimis quantity was supported by substantial evidence. After all, "the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand." *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29–30 (D.C.Cir.2005); *see also FEC v. Akins*, 524 U.S. 11, 25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (noting that, after remand, agency "might later, in the exercise of its lawful discretion, reach the same result for a different reason" than one rejected by reviewing court) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943)). "Therefore, the proper focus for this Court's inquiry is whether the [challenged agency action] upon remand is sustainable for the reasons stated in [the agency's] supplemental determination and in light of the administrative record as a whole." *Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 79 (D.D.C.2011).

It is also worth noting that many—though not all—of the considerations identified on first remand were already more or less identified in the agency's notices. *See, e.g.*, 75 Fed Reg. at 61,013 (considering "the economic impact of the proposed Order on affected entities"); 76 Fed. Reg. at 22,772 ("15 million board feet would be appropriate because such a level would still provide the Board with resources to have a program that could be successful."); *id.* ("[T]his level would exempt small operations that would otherwise be burdened by the assessment."). Given that the "de minimis quantity is defined for a particular program and industry," *id.*, the Court concludes that this case-by-case, context-specific approach, drawing on the selection criteria identified, is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. The agency's general approach to selecting a de minimis quantity, then, was perfectly permissible.

B. Sufficiency of Evidence

Although the agency's approach to determining a "de minimis quantity" was a plausible interpretation of the statute, Resolute's APA challenge also asserts that the agency's decision to choose 15mmbf was not supported by evidence in the administrative record. In other words, even if USDA's construction of an ambiguous statutory term is permissible, "the agency must [also] examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

Given the circuitous path this case has traveled—through the original cross-motions for summary judgment and the two remand orders—the Court begins its discussion by identifying precisely what may be considered record evidence relied upon by the agency during the promulgation of the Checkoff Order. It then turns to assessing USDA's explanations in its first-remand response memorandum to determine whether the evidence before the agency—coupled with the criteria it states were considered—provides the minimal support necessary to justify the selection of 15mmbf. This memorandum, while clarifying USDA's reasons for selecting 15mmbf, left the Court with concerns

regarding its methodological approach and numerical estimates. It accordingly remanded again, this time ordering the agency to provide specific primary sources and clarification as to the estimates USDA purported to have relied upon. The Court concludes by assessing the agency's second remand memorandum in response to the latter order.

1. Administrative Record Evidence

As the agency included new attachments and exhibits as part of its responses to the Court's two remand orders, the Court must first discuss their admissibility and what documents it will consider in determining whether the agency provided a "rational connection between the facts found and the choice made." *Americans for Safe Access*, 706 F.3d at 449 (internal quotation marks and citation omitted).

In contrast to most federal-agency rulemaking, the CPRIA leaves open the possibility for private-industry groups to come to the agency and propose potential marketing orders. *See* 7 U.S.C. § 7413(b)(1)(B)(i) (A checkoff order "may be ... submitted to the Secretary by ... an association of producers of the agricultural commodity."). As a result, in this instance it was the Blue Ribbon Commission that came to USDA with the proposal for a checkoff order. The Secretary's obligation was then to "determine[ ] that a proposed order is consistent with and will effectuate the purpose of" the CPRIA. *Id.* § 7413(b)(2). So satisfied, the Secretary then "publish[es] the proposed order in the Federal Register and give[s] due notice and opportunity for public comment ...." *Id.* This the Secretary did, publishing a notice of the proposed rulemaking and seeking comments from concerned parties regarding the Checkoff Order. *See* 75 Fed. Reg. at 61,002. Sixth months later, the Secretary responded to those comments and announced the final Checkoff Order and referendum to ratify it. *See* 76 Fed. Reg. at 22,757–22,775. After ratification of the proposed Order by eligible voters, AMS published a notice announcing its implementation. *See* 76 Fed. Reg. at 46,185.

These notices appear to have relied heavily on the submissions of the BRC—which proposed the Checkoff Order—in particular its report, "BRC Proposal for a National Research and Promotion Program For Softwood Lumber," *see* Letter from Jack Jordan, BRC Chairman, to Robert C. Keeney, Deputy Administrator, USDA, AMS (Feb. 16, 2010),

Attach. B ("Overview, Justification, and Objectives for a National Research and Promotion Program For Softwood Lumber") ("BRC Proposal") (AR1353–AR1364), as well as the BRC's "20 Myths and Facts About the Softwood Lumber Check-off" ("20 Myths") (AR0061–AR0065), a pamphlet circulated to softwood-lumber industry participants. While neither of these documents was cited in the agency's notices, they were included in the Joint Appendix and form the core of the agency's administrative record.

In addition to these documents, both the BRC and the agency heavily relied on a 2009 U.S. Forest Service research report. *See* Henry Spelter, David McKeever & Daniel Toth, *Profile 2009: Softwood Sawmills in the United States and Canada*, FPL–RP–659 (Oct. 2009) (ECF No. 33, Exh. A) ("*Profile 2009*")). This *Profile 2009* report was cited both in the BRC's own report, *see* BRC Proposal at 4 (AR1353), and in the agency's notices in the Federal Register. *See, e.g.*, 75 Fed. Reg. at 61,003 nn. 1, 3 & 6; *id.* at 61,004 nn. 7–*8* & 10; *id.* at 61,012 nn. 14 & 16; *id.* at 61,013 n. 17. Because this document contains statistics on the number of sawmills and total softwood-lumber production capacity for all U.S. and Canadian softwood-lumber companies, it was central to both the BRC's proposal and the agency's decisionmaking process, and is thus front and center in the dispute between the parties here. The Court therefore will consider this document as part of the record.

On top of these documents, as part of its response to the Court's second remand order, Defendants provided additional exhibits to explain the calculations upon which the agency relied during rulemaking. Resolute contends that these documents may not be considered part of the administrative record, for "USDA never requested and was never granted leave to expand or supplement the record, and USDA never provided for the record data to substantiate its conclusions." Pl. Second Remand Resp. (ECF No. 35) at 4. While it is true that these exact materials were not submitted as part of the Joint Appendix, the Court disagrees that it may take no consideration of them whatsoever. Most of the additional exhibits provided by USDA in both remands help to explain the conclusions drawn from the documents that were extensively cited in the agency's Federal Register notices, and where "the raw data itself is at issue and was directly considered, analyzed, or manipulated by the agency in the course of reaching its decision, that raw or underlying

data is 'properly considered part of the administrative record.' " *Univ. of Colorado Health at Mem'l Hosp. v. Burwell*, —— F.Supp.3d ——, ——, No. 14–1220, 2015 WL 6911261, at *14 (D.D.C. Nov. 9, 2015) (quoting *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 2007 WL 3049869, at *4 (N.D.Cal. Oct. 18, 2007)). After all, any materials an agency considered "either directly or indirectly" must be considered part of the administrative record. *See Marcum v. Salazar*, 751 F.Supp.2d 74, 78 (D.D.C.2010). As the Court's two remand orders specifically pointed to the BRC's Proposal and the Forest Service's *Profile 2009* and ordered the agency to explain how it used the data contained therein in developing its estimates reported in the Federal Register, the Court will consider exhibits attached to the remand memoranda to the degree they shed light on the agency's underlying rationale. To do otherwise would undermine the very purpose of the Court's two remand orders.

Finally, the agency provided several new documents as exhibits to its two remand memoranda that were not previously part of the administrative record. While the agency can provide additional attachments to explain how it came to the decision it did, the Court nevertheless must still rely only on evidence contained in the extant administrative record that supports the agency's rationale and selection at the time it made the decision. *See Prairie State Generating Co. LLC v. Sec'y of Labor*, 792 F.3d 82, 93–94 (D.C.Cir.2015) ("[T]he 'focal point' in arbitrary-and-capricious review is 'the administrative record already in existence' ") (quoting *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)); *see also Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 441 (D.C.Cir.2012) ("In evaluating an agency's decisionmaking, our review is fundamentally deferential ... [b]ut we are limited to assessing the record that was actually before the agency.") (citation and internal quotation marks omitted). The Court will, however, consider these documents to the degree that they shed light on how the agency considered evidence elsewhere contained in the extant administrative record.

2. First Remand Explanation

Having addressed questions concerning evidence in the record, the Court now pivots to an assessment of the agency's first remand explanation. As a reminder, the Barnes Memorandum explains that

USDA considered several factors in selecting its de minimis threshold, including (1) free-rider implications of a particular quantity; (2) an estimate of the total quantity of the particular agricultural commodity (both quantity assessed and quantity exempted); (3) the impact of such a limit on small businesses; and (4) the available funding to support a viable program operating at that exemption threshold. See Barnes Mem. at 2. The Court will discuss each of these considerations and the evidence Defendants cite to support selecting 15mmbf as the de minimis quantity, as well as Resolute's objections.

a. *Free Riders*

The first—and perhaps most straightforward—claim is that the agency took free riders into consideration when selecting the de minimis quantity. Barnes explains that "[i]n approving the proposed exemption threshold of 15[mmbf], USDA took into consideration the potential impact of free riders on an effective checkoff program for softwood lumber." *Id.* at 5. Rather than pointing to manifest evidence of this in the Federal Register, however, the agency cites only to the BRC's statements in its proposal that " 'free riders within the industry have taken advantage of the voluntary nature of the programs, frustrating enthusiasm and support for fundraising among the paying players.' " *Id.* (quoting BRC Proposal at 10 (AR1359) (emphasis omitted)). The agency's Barnes Memorandum further emphasizes the free-rider concerns raised in the BRC's "leaflet advocating approval of the checkoff order," which states that the exemption's "impact would be 'de minimis as far as free riders [are] concerned.' " *Id.* at 5 (quoting 20 Myths at 3 (AR0929)). As Resolute rightly points out in response, "USDA does not cite any Federal Register notice to show that USDA considered free riders and agreed with the BRC about the impact of the exemption" as to that consideration. *See* Pl. First Remand Reply (ECF No. 28) at 12 (emphasis added). This is only the first of several problems with Defendants' explanation on remand.

b. *Estimates of Total Quantity Assessed and Exempted*

Defendants' second factor was the total quantity of softwood lumber that would be assessed as well as the portion exempted from assessment as de minimis. As USDA largely points to the BRC's estimates to

substantiate this, *id.* at 3–5, the Court begins there. In proposing the Checkoff Order, the Blue Ribbon Commission settled on a 15mmbf "de minimis exemption for all producers and importers." BRC Proposal at 10 (AR1359). To justify this selection, the BRC provided estimates of the percentage of total softwood-lumber production capacity that would be excluded from assessment at this exemption level. Estimating that a total of 664 companies in the United States and Canada had an approximate total production capacity of 74.9 billion board feet of softwood lumber in 2007, the BRC then estimated the share of production capacity it expected would be exempted based on several different de minimis quantities. *Id.* at 11 (AR1360). It concluded that exempting producers whose production capacity was "[u]nder 16mmbf" per year would result in 257 companies representing 2.5% of total capacity being fully exempted. *Id.* Despite the fact that both the BRC and the agency rely on this estimate as a chief justification for the de minimis quantity, the estimate itself is inexplicably listed as "[u]nder 16mmbf" per year, not under 15mmbf. The Court is uncertain whether this is a transcription error, as everywhere else the agency treats these estimates as if they measure an exemption of 15mmbf, not 16mmbf.

This discrepancy aside, the BRC also reported that exempting the first 15mmbf in production capacity for all companies (including those with greater than 15mmbf annual production capacity) would expand the amount not assessed from 2.5% to 11.3% of total softwood-lumber production capacity. *Id.* The proposal went on to state that "[t]he BRC believes that this proposal will meet both criteria, on the one hand be acceptable to the industry, and on the other mount a program of sufficient size and scope to achieve meaningful results in the marketplace." *Id.* at 10 (AR1359).

Turning now to USDA's decisionmaking process, the Barnes Memorandum states that USDA "[c]oncurr[ed] with the BRC that companies that produced under 15[mmbf] annually equated to about 2.5% of the industry's total assessable volume." Barnes Mem. at 4. On this basis, "USDA concluded that the adoption of the proposed exemption threshold of 15[mmbf] was appropriate because 2.5% of the total assessable volume of softwood lumber is a 'de minimis quantity' of that commodity and because the use of that threshold would not result in a substantial amount of uncollected assessments." *Id.*

As Resolute points out, *see* Pl. First Remand Reply (ECF No. 28) at 3 & n. 2, this is a blatant contradiction of the evidence provided in the administrative record at the time the agency announced the Checkoff Order. As the agency stated in the Federal Register when it issued the notice of proposed rulemaking,

> Regarding exemption levels, the BRC explored projected assessment income at exemption levels of 15, 20, and 30 million board feet. With a 15 million board foot exemption, the BRC projected a deduction of 11.3 percent in assessment income. Table 4 below shows the BRC's projected income levels at various assessment options in light of the proposed 15 million board foot exemption.

75 Fed Reg. at 61,013 (emphasis added). Resolute is correct that the agency never once cited the 2.5% exemption estimate in its notices in the Federal Register. It is difficult to credit the agency on first remand when it states that it concluded that "2.5% of the total assessable volume of softwood lumber is a 'de minimis quantity' of that commodity ...." Barnes Mem. at 4. If so, why did the agency report that 11.3% of quantity was exempted rather than 2.5%?

Deepening the Court's frustration is the fact that the Barnes Memorandum does not clarify how the agency (or the BRC) arrived at either the 2.5% or the 11.3% estimate. Both statistics are cited without any explanation as to their origin or source. And while both appeared to derive from the BRC's proposal, that proposal was not cited by the agency in its notice of proposed rulemaking, and the BRC proposal itself does not identify its source of these estimates. *See* BRC Proposal at 11 (AR1360). Even after the first remand order the Court was thus still unable to understand precisely what percentage of softwood lumber the agency thought would be exempted from assessment when it promulgated the Checkoff Order. As discussed below, this same methodological problem plagues the agency's estimate of companies exempted from the Checkoff Order, which in turn necessitated a further remand order from the Court.

c. *Impact on Small Companies*

Another factor the agency states it "considered in approving the proposed exemption threshold ... was the impact that the exemption would have on small companies." Barnes Mem. at 5. In part, this is because the agency was "required to examine the impact of the proposed rule on small entities" under the Regulatory Flexibility Act, 5 U.S.C. §§ 601–12. *See* 75 Fed. Reg. at 61,012. As defined by regulations promulgated under the RFA, small softwood-lumber entities are those that "hav[e] annual receipts of no more than $7 million," which the agency roughly translated as meaning manufacturers "who ship[ ] less than 25[mmbf] per year ...." 75 Fed. Reg. at 61,012. Drawing on data from the American Lumber Standard Committee (ALSC), the agency estimated that "363 domestic manufacturers, or about 61 percent [of 595]," were small entities that shipped less than 25mmbf per year. *Id.* at 61,012 & n. 15; *see also* Parrott Mem. at 8–9 ("Data obtained from the [ALSC] provided the ostensible basis for these sentences"). As for the foreign-importer data, the agency stated that it relied on "Customs data" suggesting that "there were about 883 importers of softwood lumber annually. About 798 importers, or about 90 percent, imported less than" 25mmbf per year and were thus small entities as defined by the RFA. *See* 75 Fed. Reg. at 61,012.

While a helpful starting point, this explanation did not actually address the impact of the 15mmbf exemption on these small entities. Although the agency claimed that "USDA has performed this initial RFA analysis regarding the impact of the proposed rule on small entities," 75 Fed. Reg. at 61,014, it nowhere stated what the impact of the 15mmbf exemption would be on companies shipping less than 25mmbf, such as the number of companies that ship between 15mmbf and 25mmbf per year (and would therefore pay assessments under the Checkoff Order), and how these companies might be affected by the assessments.

Instead, the agency provided estimates of the impact of the 15mmbf exemption on companies shipping less than 15mmbf per year, which it believed numbered 232 out 595 domestic manufacturers. *Id.* Combining these 232 domestic manufacturers with the estimated 780 out of 883 foreign companies that imported less than 15mmbf per year, the agency determined that a total of 1,012 producers out of 1,478 would be exempt

from assessments under the proposed Order. *Id.* at 61,015. The agency, however, never justified why 15mmbf was a reasonable proxy for a small company, as opposed to the 25mmbf definition of small entity as defined by the RFA. In response to comments, the agency merely stated that it "concur[red] with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment," 76 Fed. Reg. at 22,772, never distinguishing between 15mmbf and 25mmbf. As a result, under the agency's own (and only) definition of small entity—the 25mmbf measure used for its RFA analysis—many such small entities would, presumably, be "burdened by the assessment." Yet USDA provided no discussion as to how many such companies would be affected or the extent of the burden.

Even more troubling, prior to the second remand order, the Court also had reason to doubt the integrity of USDA's estimate that 232 out of 595 domestic manufacturers ship less than 15mmbf per year because the denominator for this estimate appeared spurious. As Resolute argues, there is a wide disparity between the estimates provided by the agency in the Federal Register and those offered by the BRC, which USDA purported to rely on. *See* First Remand Reply (ECF No. 28) at 8. The BRC's proposal, which did not offer separate estimates for domestic and foreign entities, suggested that with a 15mmbf exemption, approximately 257 combined domestic and foreign entities would be exempted out of a total of 664. *See* BRC Proposal at 11 (AR1360). These numbers are not even close to the USDA combined estimates of 1,012 out of 1,478. The contrasting figures are puzzling because it appears that both USDA and the BRC derived their estimates from the same source of data—the Forest Service *Profile 2009* report. *Id.* n. 14 (citing *Profile 2009*); BRC Proposal at 4 (AR1353) (stating that "data and much of the information in this application has been compiled from" Profile 2009).

Even more problematic, the *Profile 2009* report does not measure the number of softwood-lumber entities; it only provides estimates for the number of North American sawmills. Given the confusion over just what USDA was measuring, the Court examined the *Profile 2009* report itself, as it explained in its second remand order. *See Resolute Forest Products*, 2016 WL 1714312, at *2–3. USDA had claimed that its estimate of 595 domestic manufacturers was a "number [that] represents separate business entities; one business entity may include multiple sawmills." 75

Fed. Reg. at 61,012. Yet the agency cited *Profile 2009* as the source of this information, *see id.* at n. 14, and that document makes clear that the estimates measure "past and current capacity of sawmills"—not entities. *See Profile 2009* at 15. To confirm this, the Court itself averaged the number of U.S. sawmills in 20 tables listed in the appendix of the *Profile 2009* report for the years 2007, 2008, and 2009, and arrived at the same number that USDA cited in the Federal Register, 595. The problem, of course, is that Profile 2009 reported 595 as the number of sawmills, whereas the agency reported 595 was the number of entities. *Compare Resolute Forest Products,* 2016 WL 1714312, at *4 tbl. 1, *with* 75 Fed Reg. at 61,012 *and* 76 Fed. Reg. at 22,767.

Prior to the second remand order, then, the agency had provided neither a coherent analysis of the impact of the 15mmbf exemption on "small entities" nor a reliable source of data for its estimates concerning the number of softwood-lumber entities exempted from assessment. The Court will return to this issue after summarizing its second remand order below.

d. *Sufficient Revenue*

The last factor the agency points to in the Barnes Memorandum is "whether a checkoff order that contained [the 15mmbf exemption] threshold would generate enough income to support a viable and effective research and promotion program for softwood lumber." Barnes Mem. at 6. Drawing again on estimates provided by the BRC, *see* BRC Proposal at 10–11 (AR1360–61), the agency "found that 'the [proposed exemption] and the initial $0.35 per thousand board foot assessment rate' would generate 'between $12.4 and almost 19 million [per year] ... with shipment levels ranging from 40 to 60 billion board feet.' " Barnes Mem. at 6 (quoting 76 Fed Reg. at 22,773). The Barnes Memorandum goes on to state that "[a]greeing with the BRC that '$20 million is an ideal threshold for an effective program ...' USDA approved the proposed exemption." *Id.* at 6–7 (quoting 76 Fed. Reg. at 22,767).

Resolute objects to this explanation, arguing that USDA improperly relied not on data for shipments in 2010 but instead on production capacity as of 2007. *See* First Remand Reply (ECF No. 28) at 5. Given the substantial differences between these measurements and the years in

question, this could drastically alter the amount of revenue expected to be generated under the Checkoff Order. Plaintiff contends that "USDA was supposed to rely on shipment data from 2010," which was the "representative period" under 7 U.S.C. § 7417(a)(1). *Id.* at 4. It also alleges that the "BRC stated, without justification or explanation, that production capacity was being used in this analysis as a proxy for shipments." *Id.* at 5 (citation and internal quotation marks omitted). Resolute's objection is effectively two challenges: one to the year of measurement (2007 vs. 2010), the other to the type of quantity measured (capacity vs. shipments). The Court tackles each of these grievances in turn.

i. 2007 vs. 2010

The statutory provision concerning the "representative period" provides no instruction as to how to measure that period, stating only that an optional referendum must include as participants those "persons subject to an assessment" who "engaged in" the "production" or "importation" of the commodity "during a representative period determined by the Secretary." 7 U.S.C. § 7417(a)(1)(A)–(B). For the purposes of determining participants in the referendum, that period was calendar year 2010, the most recent year for which data was available. In announcing the referendum on April 22, 2011, USDA stated that eligible participants would include all those who "have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period from January 1 through December 31, 2010." 76 Fed. Reg. at 22,757. Such a determination appears to be eminently reasoned and appropriate.

What is left of Resolute's challenge is the lag between the year of data relied upon for the initial proposal and the year used for referendum-eligibility purposes. The Court thus now considers the reasonableness of the delay between the year relied on for developing the estimates (2007) and the referendum "representative period" (2010). Because the agency was required to undergo notice-and-comment rulemaking before implementing the referendum, some delay between the time of the BRC's proposal to USDA and the final implementation of the referendum was all but inevitable. *Cf N. Mariana Islands v. United States*, 686 F.Supp.2d 7, 15–16 (D.D.C.2009) (finding 18 months

reasonable period for agency to undergo notice-and-comment rulemaking). After all, notice-and-comment rulemaking was not the first step in the process here; the BRC had to first gather research on the utility and feasibility of the proposed Checkoff Order, engage USDA in getting the Secretary's approval, and assist in the formulation of the proposed rule. The record suggests this time period was lengthy; as of February 2010, the BRC seemed to indicate it had already worked with AMS for the prior two years on the proposed Checkoff Order. *See* Jordan Letter at 2 (AR1351) (expressing appreciation for AMS's assistance "over the past two years"). Some amount of delay is therefore reasonable between the initial data gathering required to develop a proposed rule and the final rule issued after notice-and-comment rulemaking. Nor was the agency ignoring substantially more recent data; when it issued the notice of proposed rulemaking, it appears that the latest year for which complete data was available was 2008. *See* BRC Proposal at 11 (AR1360) (providing only estimated as opposed to actual softwood-lumber consumption data for the year 2009). While Resolute is correct in recognizing that the difference between 2007 and 2010 was probably significant considering the effects the recession had on the softwood-lumber market, if this were the only problem with the agency's data, USDA would likely be on firm footing.

ii. Production Capacity vs. Shipments

Resolute's objection to the time period of the estimates gains traction, however, when considered alongside its complaint about substituting production capacity for shipments in selecting the 15mmbf de minimis quantity. The Court shares Plaintiff's concern about the agency's unaccounted use of production capacity in place of actual shipments, given the potentially vast differences between these measures. Resolute charges that "[t]he BRC stated, without justification or explanation, that production capacity was being 'used in this analysis as a proxy for shipments.' " Reply at 5 (quoting BRC Proposal at 11 (AR1360)). Technically speaking, the BRC did provide some explanation: "Given current market conditions this table is 'relatively' correct, but doesn't take into account recent temporary and permanent closures, reduced production, and possible omissions or double counting due to subsidiary relationships. Efforts were made to eliminate these." BRC Proposal at 11 (AR1360).

This explanation nevertheless falls far short of a justification for the choice, particularly when the very same page of the BRC Proposal makes clear just how stark the differences were between production capacity and shipments: while in 2009 actual U.S. consumption of softwood lumber was estimated to be only 31.9bbf, the estimates used to justify the 15mmbf exemption measured nearly 75bbf in production capacity in 2007—well over double actual consumption. *Id.* Here, the year in question made a substantial difference: the BRC's data for 2007, 52.7bbf in shipments vs. nearly 75bbf in capacity, shows a far smaller gap between capacity and shipments than in 2010, confirming the significance of Resolute's concern that the pre-recession data was significantly outdated. *Id.* Worse still, while the BRC was at least transparent about the difference between production capacity and actual shipments, nowhere in the agency's notices did USDA make clear that its estimates regarding the 15mmbf exemption were based on production capacity, not actual shipments. It instead merely opaquely referenced—without citation—the BRC's estimates. This measurement is also troubling because it treats all of U.S. and Canadian softwood lumber as a common market. Yet it is conceivable, if not probable, that much of Canadian softwood lumber remains in Canada and is not imported into the United States, which means that some additional portion of that production capacity would never turn into actual shipments to the United States.

3. Second Remand Explanation

Resolute's arguments concerning use of 2007 capacity data vs. 2010 shipment data, confusion over whether 2.5% or 11.3% of softwood lumber would be exempted from assessment, and discrepancies in the estimates of the number of companies exempted and those that were eligible to participate in the referendum left the Court scratching its head, uncertain as to whether any of the data cited by either the BRC or USDA was likely to have been correct (let alone supportive of the 15mmbf de minimis exemption). While an agency's "decision of less than ideal clarity" does not necessarily constitute one that is arbitrary or capricious, "the agency's path [must nonetheless be] reasonably be discerned," "including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (citation and internal

quotation marks omitted). The agency's response to the first remand fell far short of this, with discrepancies implicated in nearly every pertinent estimate the agency provided in its notice of proposed rulemaking. The Court, as a result, was assured neither that the data supported the agency's decision nor that it was accurate. Unable to discern the agency's path, the Court once more remanded the matter, this time specifically ordering that the agency provide:

> 1. An account of the BRC's "Actual U.S. Consumption 2003–2009" estimate on page 11 of its BRC Proposal for a National Research and Promotion Program For Softwood Lumber (AR1360), and verification of this estimate based on its underlying source or sources;
>
> 2. An account of the BRC's "Impact of Exemption on Check-off Participation: Capacity Removed from Assessment" estimate on page 11 of the same document, and verification of this estimate [that 257 companies representing 2.5% of capacity would be exempted] based on its underlying source or sources; and
>
> 3. Verification via underlying data of the estimates provided in the agency's notice of proposed rulemaking (Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed. Reg. 22,757 (Apr. 22, 2011) concerning the number and percentage of softwood-lumber market participants exempted from the checkoff order at the 15-million-board-feet threshold.

Resolute Forest Products, 2016 WL 1714312, at *4.

Defendants once again responded with a memorandum, this time from Charles W. Parrott, Deputy Administrator of the Specialty Crops Program of AMS. As this document provided responses to the Court's specific requests in its second remand order, the Court will assess the explanations in light of the difficulties identified above.

a. *Actual U.S. Softwood Lumber Consumption*

As to the estimates of actual softwood-lumber consumption, Parrott responds that Stephen M. Lovett, who then worked for the BRC and prepared the estimates in the BRC Proposal, drew on data supplied by Random Lengths, "a firm that 'provides the forest products industry with unbiased, consistent and timely reports of market activity and prices, related trends, issues, and analyses,' " Parrott Mem. at 2 (quoting *id.*, Exh. B (About Random Lengths)), and from Forest Economic Advisors (FEA), which "describes itself as a firm that 'brings modern econometric techniques to the forest products industry.' " *Id.* (quoting *id.*, Exh. C (About Forest Economic Advisors)). Random Lengths, in turn, advised the agency in response to the second remand order that it obtains figures like those drawn on by Lovett from "industry associations, like the Western Wood Products Association, and industry analysts, like FEA." *Id.* (citation and internal quotation marks omitted).

Although Lovett cannot precisely replicate the calculations he made in 2010, USDA provided a similar estimate based on data available to the Court, drawing on the Forest Service's *Profile 2009* report. The agency pointed to "Table 4–United States softwood lumber end-use by market, 2003–2009" of the report, *see Profile 2009* at 3, as a close approximation of the data included in "Actual U.S. Consumption 2003–2009." BRC Proposal at 11 (AR1360). Because the Forest Service's *Profile 2009* measured total end use in cubic meters, the BRC converted this measure into billion board feet for its calculations.[1] Thus for the calendar year 2008, the estimate of 99.0 million cubic meters cited in *Profile 2009* converts to approximately 41.9 billion board feet, slightly off of the 42.7bbf estimated by the BRC in its proposal to AMS in 2010. While the difference between 42.7bbf and 41.95bbf is not zero, given the differences and variations in underlying reporting sources for the softwood-lumber market, a difference of less than 2% is not itself alarming.

Even if this data seems generally reliable, as discussed earlier, the

[1] Throughout this Opinion, the Court uses the ratio of 2.36 cubic meters per 1000 board feet (or 1:423) to convert between these two measures. *See* 75 Fed. Reg. at 61,010 ("One cubic meter is equal to 423.776001 board feet."); *see also* Parrott Mem. at 2–3.

15mmbf exemption threshold was set not on the basis of data about actual consumption, but on the basis of data bout production capacity. *See* Pl. Second Remand Response at 7 ("USDA relied (if at all) on lumber production capacity data, not on lumber consumption data ...."). And even the BRC's own data recognizes how vast the differences were between production capacity and actual shipments. As noted above, the BRC's proposal stated that actual U.S. consumption of softwood lumber was estimated to be only 31.9bbf in 2009, while the production capacity was estimated at nearly 75bbf, well over twice the consumption figure. *See* BRC Proposal at 11 (AR1360). Such a huge disparity undermines the credibility of either the 2.5% or 11.3% estimate as the actual quantity of shipped softwood lumber that would be exempted from assessment.

b. *Impact of Exemption Estimates*

The Court's second remand order also requested that the agency provide "[a]n account of the BRC's 'Impact of Exemption on Check-off Participation: Capacity Removed from Assessment' estimate ... and verification of this estimate based on its underlying source or sources." *Resolute Forest Products*, 2016 WL 1714312, at *4. In the Parrott Memorandum, the agency explains that "Lovett prepared the impact-of-exemption estimate," relying on an earlier version of the *Profile 2009* report (*see* Second Notice, Exh. E (Henry Spelter, David McKeever & Matthew Alderman, *Profile 2007: Softwood Sawmills in the United States and Canada*, FPL–RP–644 (Oct. 2007))), as well as "a draft of Profile 2009 that Mr. Lovett obtained" from the authors of what would eventually become the final published *Profile 2009* report because "he wanted to use the most recent data available." Parrott Mem. at 4. The agency also explains that "[t]he updates to the data that Mr. Lovett used consisted of information that he obtained ... regarding mill closures and mills not in operation because of the economic downturn that began in 2007." *Id.* This explanation does not seem to square with Lovett's ultimate estimates included in the BRC's proposal, for we are told that "2007 Capacity [was] used in this analysis as a proxy for 'shipments.' " BRC Proposal at 11 (AR1360). If so, then what happened after 2007 would be irrelevant to these estimates. This is yet another instance in which the agency's explanation is not on all fours with the evidence available in the administrative record.

In part to shore up doubt, the agency states that "[a]t the request of USDA, [Paul] Jannke of FEA has prepared ... two impact-of-exemption estimates using data" from "individual sawmill capacity from Appendix C to *Profile 2007*, adjusted for mills known by FEA to have closed in 2008," as well as an estimate drawing on "data on individual sawmill capacity from the Appendix to *Profile 2009*." Parrott Mem. at 5. Neither of these estimates is particularly helpful, however, as both simply rely on the same data without explaining the BRC's method that converted 897 sawmills identified in the *Profile 2009* report, *see Resolute Forest Products*, 2016 WL 1714312, at *4 tbl. 1, into approximately 629 companies, 254 (or 243) of which supposedly had production capacity of less than 15mmbf. *See* Parrott Mem. at 5; *see also* BRC Proposal at 11 (AR1360). It simply defies logic that the agency has failed on multiple remands to explain precisely how it derived its estimates for the number of companies excluded and included under the Checkoff Order, and it strongly suggests that USDA never actually knew them.

This raises a related problem with another of USDA's stated reasons for selecting 15mmbf as the de minimis quantity: generating sufficient revenue for an effective checkoff order. The substitution of capacity for shipments raises serious doubts as to whether the Checkoff Order would in fact raise the revenue both the BRC and the agency stated it must raise to be successful. In its notice of proposed rulemaking, the agency affirmed the BRC's conclusion that "an exemption threshold of 15[mmbf] was appropriate and would generate sufficient income to support an effective promotion program for softwood lumber." 75 Fed. Reg. at 61,013. This conclusion presumably drew on the BRC's proposal, which stated that "$20 million (from assessments) is the threshold for an effective program that can move the needle." BRC Proposal at 10 (AR1359). The BRC estimated that "an initial assessment rate of $0.35/mbf ... would raise sufficient funds for a $20 million program." *Id.* The BRC's own chart, however, recognized that with a 15mmbf exemption threshold, the Checkoff Order would either require shipments of 60bbf to yield $21 million at an assessment rate of $0.35/mbf or else necessitate upping the assessment rate to $0.50/mbf to yield $20 million on 40bbf in shipments. *Id.* at 10–11 (AR1359–60). If actual shipments in 2009 were 31.9bbf, however, the Checkoff Order would have yielded far less than the $14 million that was estimated at 40bbf in assessments, *id.* at 10 (AR1359), itself an amount far lower than

what the BRC suggested was necessary for an effective marketing campaign. Given these issues with the underlying data, it is difficult to understand how the agency could have concluded that the 15mmbf exemption "would generate enough income to support a viable and effective research and promotion program for softwood lumber." Barnes Mem. at 6. This, of course, is only one of the defects in the data the agency claims supported the 15mmbf exemption.

c. *Estimates of Companies Exempted and Total Companies*

The Court also ordered the agency to clarify seemingly contradictory estimates of the number and percentage of exempted softwood-lumber producers and exporters included in the Federal Register notices to ensure that "some verifiable source of data accurately depicted the softwood-lumber market." *Resolute Forest Products*, 2016 WL 1714312, at *3. Prior to the second remand order, the agency had never been able to provide a coherent account of the estimates used to assess the number of softwood-lumber companies that would be exempt from the Checkoff Order. The Parrott Memorandum, unfortunately, falls short as well. As the Court explained in its second remand order, the 595 domestic "manufacturers" that USDA cited in its notice of proposed rulemaking appears instead to be a three-year average (2007–2009) from *Profile 2009* estimates for the number of sawmills in the U.S. *Id.* at *2–3. Whereas USDA stated that this "number represents separate business entities [where] ... one business entity may include multiple sawmills," 75 Fed. Reg. at 61,012, the *Profile 2009* report on which that estimate was based clearly specifies that its count consists of sawmills, not business entities. *See Profile 2009* at 15 ("The following maps and tables show past and current capacity of sawmills and the availability of timber, by county, in the vicinity of these mills ....").

The agency retorts in the Parrott Memorandum that "[b]ecause the industry was in a state of flux, USDA considered it reasonable to use the figure 595 .... [but] should have explained, however, that the Forest Service figures were for sawmills ...." Parrott Mem. at 8. It further defends that "USDA had no data on how many sawmills were individual business entities or were part of a group of sawmills making up one business entity .... Therefore, USDA treated each domestic manufacturer (sawmill) as a separate entity in its analysis." *Id.* This explanation is

extraordinary given that the agency expressly characterized the estimate as measuring entities, *see* 75 Fed. Reg. at 61,012 ("This number represents separate business entities; one business entity may include multiple sawmills"), and then relied on that measure to determine the number of companies that would be exempted under the proposed Checkoff Order. *See*, *e.g.*, *id.* at 61,013 ("Of the 595 domestic manufacturers, it is estimated that about 232, or 39 percent, ship less than 15[mmbf] per year and would thus be exempt from paying assessments under the proposed Order."); 76 Fed. Reg. at 22,772 ("USDA concurs with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment.").

The Parrott Memorandum also reveals that the agency never really knew how many companies ship less than 15mmbf: "[25mmbf] per year is the lowest number of board feet for which [the American Lumber Standard Committee] segregated shipment data. Having no individual company shipment data to use for U.S. entities ... USDA referred in these sentences to shipments of 25[mmbf] per year rather than shipments of 15[mmbf] per year." *Id.* This is incredible considering the agency's repeated contention that it justified the 15mmbf number on the basis of the number of companies that would be exempted from assessments. In reality, it had no reliable data whatsoever concerning domestic entities shipping less than 15mmbf per year. The agency's explanation that it lacked such data, furthermore, in no way justifies falsely portraying its estimates as being those of entities rather than sawmills. As Senator Daniel Patrick Moynihan once said, "Everyone is entitled to his own opinion, but not his own facts."

Even worse, however, the agency then incorrectly transmuted the number of entities shipping less than 25mmbf—363, according to the ALSC—for the number shipping more than 15mmbf. It appears to have subtracted 363 (entities that ship less than 25mmbf) from the 595 (total sawmills) to conclude—arbitrarily—that "about 232, or 39 percent, ship less than 15[mmbf] per year and would thus be exempted from paying assessments ...." 76 Fed. Reg. at 22,767. The agency has no explanation for this astounding error, instead simply acknowledging it in a footnote on remand. *See* Parrott Mem. at 9 n. 3. In sum, the agency substituted 15mmbf for 25mmbf, sawmills for entities, and production capacity for shipments, without being transparent about any of these substitutions. To

garnish this plate of errors, it then got its basic arithmetic backwards.

Defendants' data on foreign importers is hardly more assuring. As a reminder, the agency relied on "Customs data" that suggested that "there were about 883 importers of softwood lumber annually." 75 Fed. Reg. at 61,012. The agency further stated that "[a]bout 798 importers, or about 90 percent, imported" so little softwood lumber as to be considered small entities. *Id.* The notice of proposed rulemaking later stated that 780 out of 883 importers shipped less than 15mmbf, and so only 103 foreign importers would pay assessments under the Order. *Id.* at 61,013. In contrast to most of the other estimates it discussed, the agency provided no citation as to the specific source of that estimate. Yet, despite the Court's express instruction in its second remand order to provide "[v]erification via underlying data of the estimates provided in the agency's notice of proposed rulemaking ... concerning the number and percentage of softwood-lumber market participants exempted from the checkoff order," *Resolute Forest Products*, 2016 WL 1714312, at *4, the agency failed to provide any additional support for the claim. Instead, the Parrott Memorandum merely repeats the agency's conclusory statement in its notice. *Compare* Parrott Mem. at 9 ("These sentences are based on information obtained by USDA from Customs and Border Protection (CBP) for the years 2007–2009. CBP is the sole source of information available to USDA concerning importers of record."), *with* 75 Fed. Reg. at 61,012 ("[A]ccording to Customs data, it is estimated that, between 2007 and 2009, there were about 883 importers ..."). After additional opportunities to substantiate its estimates, that is not good enough.

The absence of the underlying data is especially galling considering that the number of Canadian sawmills derived from the Forest Service's Profile 2009—an average of roughly 349, *see Resolute Forest Products*, 2016 WL 1714312, at *4 tbl. 1—is far smaller than the 883 importers cited by the agency. Because USDA itself stated that "imports from Canada ... compris[e] about 92 percent of total imports," 75 Fed. Reg. at 61,004, it seems incredible that 883 separate entities import softwood lumber into the U.S. despite the existence of only 349 Canadian softwood-lumber sawmills in total.

Defendants also appear to have introduced new errors in the Parrott Memorandum, in which it is claimed that

> USDA estimated that 335 entities domestically shipped or imported 15[mmbf] or more annually and, therefore, would pay assessments under the program (232 U.S. manufacturers and 103 importers) and 1,143 entities domestically shipped or imported less than 15[mmbf] annually and would be exempt from paying assessments (363 U.S. manufacturers and 780 importers). Given the uncertainty in the industry at the time with mills closing or not operating, USDA's estimate proved to be remarkably accurate. The 335-estimate of assessment payers was very close to the number of entities (311) that were found eligible to vote in the 2011 referendum....

Parrott Mem. at 10. Dismayingly, the agency seems once again to have transmuted its own incorrect figures. Parrott claims that 232 U.S. manufacturers were estimated to pay assessments and 363 would be exempt, but the agency's notice in the Federal Register stated just the opposite. *See* 75 Fed. Reg. at 61,013 ("[I]t is estimated that about 232 ... ship less than 15 [mmbf] per year and would thus be exempt from paying assessments ... [and] about 363 domestic manufacturers ... would pay assessments ....") (emphasis added). The Parrott Memorandum thus should have said that the total number of estimated entities paying in was 466. *See id.* ("Thus, about 363 domestic manufacturers and 103 importers would pay assessments under the Order.") This 466 estimate—which itself is based on completely spurious estimates, as discussed above—is itself not close to 311 at all. The only thing remarkable about the agency's estimates is that, even after two remands, USDA still manages to introduce new basic computational errors into its calculations in an effort to shore up its shoddy data.

In sum, the little data the agency presented in its rulemaking notices was patently misrepresentative, and after two remands it has not provided a more reliable source. The agency still has not been able to offer a coherent explanation for its estimate that "about 363 domestic manufacturers and 103 importers would pay assessments under the Order." *Id.* No source—the agency, the ALSC, or the Forest Service's *Profile 2009* report—seems to identify how many domestic

manufacturers produce less than 15mmbf per year. Lacking reliable data, the Court has no way whatsoever to assess the impact of the 15mmbf exemption on small entities, and it casts doubt on whether the agency even had its eyes on the road as it steered the proposed Checkoff Order through notice and comment.

* * *

As the Court has thoroughly expounded above, the agency's explanation of its selection of 15mmbf as the de minimis quantity exempted raises a litany of problems. Its reliance on production capacity estimates from 2007 for a rule assessing actual shipments and implemented nearly four years later undermines the agency's ability to rely on estimates regarding the percentage of softwood lumber removed from assessment. Given that actual shipments were estimated to be less than half of production capacity during this period, it also strongly calls into question whether the Checkoff Order could produce the revenue both the BRC and USDA stated were necessary to run an effective marketing campaign. Worse still, the agency has gone back and forth as to whether it relied on 2.5% or 11.3% of production capacity as the "de minimis" quantity. Its contradictions suggest the agency is either uncertain about why it made its decision, or else is simply making it up as it goes along.

In all probability, of course, neither estimate is likely to represent the actual quantity of shipments excluded from assessment under the Order. Nor does the Court have any way to verify whether this is true: despite two chances on remand, the agency has not provided an adequate explanation for how it transmuted data from the Forest Service's *Profile 2009* report on production capacities for sawmills into data on shipments by entities. Nor has it provided the underlying U.S. Customs data it purports to have used to estimate the number of foreign importers. The agency's problems do not end there, however. On first remand the Barnes Memorandum states that USDA considered "the impact of program requirements on small businesses," Barnes Mem. at 2, but essentially all of those data seem faulty, contradictory, or unsubstantiated, and the agency's Parrott Memorandum on second remand could not resolve them. The agency's claim that it considered the "free rider implications" of a 15mmbf exemption is not substantiated by

any indication of this whatsoever in its rulemaking notices.

The record, in sum, simply contains too many misstatements, unsubstantiated (or incorrect) estimates, and statements contradicted by the agency's subsequent litigation positions to support the selection of 15mmbf as the de minimis quantity. It is no rejoinder that the BRC had better estimates and a clearer understanding of the measurements in question. While the CPRIA contemplates cooperation between the agency and industry groups in proposing and implement checkoff orders, the Secretary remains obligated under the statute to "determine[ ] that a proposed order is consistent with and will effectuate the purpose" of the CPRIA, 7 U.S.C. § 7413(b)(2), and this must—at a minimum—require an independent verification that there was a "rational connection between the facts found and the choice made." *Americans for Safe Access*, 706 F.3d at 449 (internal quotation marks omitted). Given the record in this case, no reliable evidence suggests the agency verified (or even could verify) a rational connection between the estimates and the BRC's selection of 15mmbf as the de minimis quantity. The agency, furthermore, is required to "give due notice" about the proposed order in the Federal Register, *see* 7 U.S.C. § 7413(b)(2), and "due notice" surely requires reasonably accurate (and certainly not blatantly misleading) data to substantiate its decision and provide interested commentators with the opportunity to assess the proposed rule.

As cited above, "an agency rule [is] arbitrary and capricious if the agency ... offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. None of the relevant evidence provided by USDA during rulemaking could reasonably be relied upon to conclude that 15mmbf would be a de minimis quantity because none of the statistics cited can be reasonably relied upon to measure what they purport. And where an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon, its decision is arbitrary and capricious and should be overturned. *See*, *e.g.*, *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 502–03 (9th Cir.2014) (overturning agency's determination as arbitrary and capricious after finding agency assumptions were made based on contradictory estimates and without rational basis in record); *Kentucky*

Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 410 (6th Cir.2013) (overturning as arbitrary and capricious agency's permit reauthorization where agency relied on inappropriate estimates to gauge impact of reauthorization); *Sierra Club v. EPA*, 671 F.3d 955, 965–66 (9th Cir.2012) (overturning as arbitrary and capricious agency's action where it failed to consider newer "data [that] told a different story than ... earlier data" that agency had actually relied upon and where agency had failed to provide an adequate explanation for its reliance on outdated data).

In short, "a court must be satisfied from the record that " 'the agency ... examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.' " *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir.2008) (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856). After all, "[t]he requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result." *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir.1993). This standard "mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C.Cir.1995) (*quoting Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990)). The Court has given the agency multiple chances to provide that explanation, and it has fallen short each time. Without any reliable data to support the selection of 15mmbf as the de minimis quantity exempted, that decision cannot be characterized as anything other than arbitrary and capricious.

Finally, what of Resolute's constitutional challenges? Because the Court has found the Checkoff Order arbitrary and capricious as promulgated, it need not reach Resolute's constitutional challenges to the CPRIA, both facial and as applied. *See Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."); *see also Resolute Forest Products*, 130 F.Supp.3d at 105.

IV. CONCLUSION

On the basis of the contradictory, conflicting, and misstated estimates described above, the Court concludes that the agency's selection of 15mmbf as the de minimis quantity was arbitrary and capricious and that, accordingly, the Checkoff Order was promulgated unlawfully. The Court in the accompanying Order will set a hearing to discuss the appropriate next steps concerning the remedies sought by Plaintiff.

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COURT DECISIONS

EQUAL CREDIT OPPORTUNITY ACT

UNITED STATES v. WISE.
No. 5:14-CV-844-FL.
Court Order.
Filed April 12, 2016.

ECOA – Civil Rights – Discrimination – Motion for reconsideration – *Pigford* consent decree – Program-discrimination complaint, filing of – Res judicata – Stay.

[Cite as: No. 5:14-CV-844-FL, 2016 WL 1448641 (E.D.N.C. Apr. 12, 2016)].

The Court denied Defendants' motion to reconsider its earlier order in which the Court denied a stay of judgment pending Defendants' appeal. The Court held that denial of Defendants' motion for reconsideration was proper because Defendants failed to raise any new arguments that had not been previously addressed by the Court. In so holding, the Court found: (1) that, because the *Pigford* consent decree does not apply to claims existing at the time it was approved by the court, Defendants' discrimination claim was not covered; (2) that Defendants failed to provide evidence to show that their program discrimination complaint was "accepted as valid," and the mere filing of a program discrimination complaint does not trigger a moratorium; (3) that Defendants filed their program discrimination complaint well after the 180-day limitations period. The Court noted that, although Defendants were entitled to dispute the Court's earlier conclusions, "mere displeasure, disagreement, or divergence of mind is an insufficient basis upon which to rest a motion for reconsideration."

United States District Court,
Eastern District of North Carolina.

ORDER

W. EARL BRITT, SENIOR U.S. DISTRICT JUDGE, DELIVERED THE ORDER OF THE COURT.

This matter is before the court on defendants' (the "Wises") motion to reconsider the court's February 25, 2016, order denying a stay of its judgment pending the Wises's appeal. (DE 84). The issues raised have been briefed fully. For the reasons that follow, the court DENIES the Wises's motion to reconsider.

EQUAL CREDIT OPPORTUNITY ACT

I. BACKGROUND

A. Origin of the Wises's Debts

From 1996 until sometime in 2010, the Wises incurred more than $500,000.00 in debt from certain loans extended to them by the United States Department of Agriculture ("USDA"), through the Farmer's Home Administration ("FmHA") and its successor, the Farm Services Agency ("FSA"). The Wises secured that debt by granting the USDA a security interest in their real and personal property, evidenced by certain deeds of trust and security agreements. (*See* DE 1-10 through 1-16). During that time, the FmHA, and later the FSA, also serviced the Wises's loans, which allowed the Wises to repay both their principal debt and accrued interest over a longer period of time, and in substantially smaller installments, than was provided by their original debt instrument. However, in 2011, the FSA refused to service the Wises's loans. The motive behind the FSA's refusal is disputed. From the government's perspective, the FSA declined servicing because the Wises's farm profits were so insubstantial that they could not cover even a small portion of their steadily-mounting debt. The Wises, who are African-American, tell a different story; from their perspective, the FSA's refusal to continue servicing their loans amounted to race-based discrimination.

B. The First Law Suit

In 2013, the Wises sought to vindicate their racial-animus theory and brought suit against the USDA under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, which makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction" on the basis of race, among other things. *Id.* at § 1691(a). *See generally Wise v. USDA*, No. 4:13-CV-234-BO (E.D.N.C.) (sometimes, the "2013 suit"). In addition to suing the USDA, the Wises also sued several USDA employees in their individual capacities, each of whom allegedly was involved in the FSA's refusal to service the Wises's loans. On October 27, 2014, the court dismissed the Wises's 2013 suit on the government's motion for failure to state a claim upon which relief could be granted. *See Wise v. USDA*, No. 4:13-CV-234-BO, 2014 WL 5460606 (E.D.N.C. Oct. 27, 2014). The Wises noted a timely appeal, and the Fourth Circuit affirmed the district court. *See Wise v. USDA*, 592

Fed.Appx. 203 (4th Cir. 2015).

C. The Instant Proceedings

On November 19, 2014, while the Wises's appeal was pending, the government initiated this proceeding to collect the Wises's outstanding debt, which it accelerated by notice dated August 14, 2013. The government sought to foreclose its security interest in the Wises's real and personal property, evidenced by the deeds of trust and security agreements, through judicial foreclosure. On December 2, 2014, the Wises asserted against the USDA various counterclaims. Those counterclaims included federal claims alleging 1) race-based discrimination in the extension of credit, in violation of the ECOA; 2) "deliberate indifference" to their civil rights, in violation of the Fourteenth Amendment, as enforced by 42 U.S.C. § 1983; 3) conspiracy to interfere with civil rights, in violation of 42 U.S.C. § 1985; 4) neglect to prevent a conspiracy to interfere with civil rights, in violation of 42 U.S.C. § 1986, as well as a claim for review of administrative action under the Administrative Procedure Act, 5 U.S.C. §§ 701–06. In addition, the Wises asserted claims for fraud, negligent supervision and negligent retention under North Carolina law. The Wises's counterclaims were substantially identical to the claims asserted against the USDA and certain of its employees in the 2013 suit. The Wises's counterclaims also were interposed against a subset of the same USDA employees; although, in their counterclaims, the Wises sued the employees in both their official and individual capacities.

On January 26, 2015, the government filed a motion to dismiss the Wises's counterclaims based on res judicata. In particular, the government argued that the Wises's claims were barred because the Wises either already had brought each claim, or already should have brought such claim, as part of the 2013 suit. Later, on March 10, 2015, the government filed a motion for summary judgment on its foreclosure claim. The court granted the government's motion to dismiss by oral order entered at a hearing held on September 14, 2015. At that hearing, the court also indicated that it would grant the government's motion for summary judgment by a subsequent written order, which entered on October 9, 2015. *See United States v. Wise*, No. 5:14-CV-844, 2015 WL 5918027 (E.D.N.C. Oct. 9, 2015) (the "*Foreclosure Order*"). However,

to ensure judgment extinguished fully the rights secured by the deeds of trust, the court withheld entry of judgment and directed the government to name as plaintiff the trustee or substitute trustee of the deeds of trust at issue. The government filed its amended complaint on October 19, 2015, naming as plaintiff Charles M. Huskey, the substitute trustee.[1]

Prior to the filing of the government's amended complaint, on October 14, 2015, the Wises filed a motion to reconsider the *Foreclosure Order* (their "First Motion to Reconsider"). In their First Motion to Reconsider, the Wises raised three principal arguments. First, they contended the court should reconsider the *Foreclosure Order* because, before the court's judgment properly could enter and before the government could begin a foreclosure sale, they were entitled to an administrative hearing before the USDA. The Wises substantiated their demand for a hearing by directing the court to the fact of their participation in a 1997 class action suit against the USDA, which followed the major revelation of a long and embarrassing history of racial discrimination in USDA-administered programs. *See generally Pigford v. Glickman*, 182 F.R.D. 341 (D.D.C. 1998) (discussing background and certifying class). The *Pigford* case was settled by consent decree, *see Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (providing slight modification to class and approving consent decree), which provided a complex settlement procedure whereby class members could either "opt out" of the class, or stay in the class and elect from one of two different claim settlement methods, colloquially known as "Track A" and "Track B." *See generally In re Black Farmers Discrimination* Litig., 856 F. Supp. 2d 1 (D.D.C. 2011) (explaining *Pigford* consent decree settlement procedures).[2]

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[1] For ease of reference, the United States and plaintiff Huskey are referred to collectively as "the government" throughout.

[2] "'Track A' allowed a claimant to prevail by presenting 'substantial evidence' of discrimination to a neutral, third-party 'Adjudicator.' " *Black Farmers*, 856 F. Supp. 2d at 9. By contrast "Track B claims were to be heard by another third-party neutral, the 'Arbitrator,' who could receive written testimony and documentation as evidence but would conduct only a one-day mini-trial of each plaintiff's claims." *Id.* at 10. Claimants choosing Track B, unlike those proceeding along Track A, were required to prove their claims by a preponderance of the evidence." *Id.* Claims under Track A were subject to a cap on damages, while claimants proceeding under Track B were awarded the full amount of damages necessary to compensate them for their loss. *Id.* at 9–10.

Second, the Wises argued that the court should reconsider its *Foreclosure Order* because their loans were subject to a statutory and regulatory moratorium on foreclosure. The Wises contended that the moratorium was triggered because, sometime after the court's September 14, 2015 hearing, they had filed a complaint with the USDA's Office of Administrative Law Judges ("OALJ"), alleging racially discriminatory financing practices in violation of the ECOA, known as a "claim of program discrimination" or a "program discrimination complaint." *See generally* 7 U.S.C. § 1981a(b) (establishing moratorium when "claim of program discrimination" is "accepted as valid"); 7 C.F.R. § 766.358(a) (same; using the term "program discrimination complaint"). Third, the Wises argued that the court should reconsider the *Foreclosure Order*, withhold entry of judgment, and transfer this case to the United States District Court for the District of Columbia. The Wises contended that district court had exclusive jurisdiction over their counterclaims, and all claims interposed by members of the *Pigford* class alleging racial discrimination in the administration of USDA funded programs, by virtue of the *Pigford* consent decree.

On November 18, 2015, the court denied the Wises's motion for reconsideration. *See generally United States v. Wise*, No. 5:14-CV-844-FL, 2015 WL 7302245 (E.D.N.C. Nov. 18, 2015) (the "*First Reconsideration Order*"). On the Wises's first argument, the court held that they had failed to demonstrate reconsideration was proper where their own evidence, as well as evidence submitted by the government, demonstrated that they had opted out of the *Pigford* class. (*See* DE 44-1, 2; *see also* DE 40-11, 2) ("[We] chose to opt out of the *Pigford v. Veneman* class action lawsuit and become lead plaintiffs in a new class action lawsuit against the USDA called *Wise v. Veneman*."). The *First Reconsideration Order* went further and held that even assuming the Wises were part of the *Pigford* class, their discrimination allegations were not covered by the consent decree where that document had no effect on prospective, or future, claims.

Finally, on the Wises's first argument, the court considered and rejected the applicability of § 741 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 § 741 ("§ 741") (codified at 7 U.S.C. § 2279 (historical note)). Section 741 waived the statute of limitations for ECOA

claims alleging discrimination "during the period beginning on January 1, 1981 and ending December 31, 1996," and provided for an administrative hearing prior to the foreclosure of loans potentially tainted by such ECOA claims. *Id.* § 741(e). The Wises argued that the government was required to provide an administrative hearing on their claims arising in 2011. The court rejected that argument, holding that § 741 did not apply to discrimination claims arising outside the relevant time period, January 1, 1981, to December 31, 1996. The court also held that,§ 741 did not necessarily entitle the Wises to an administrative hearing on their ECOA claim, because administrative relief could be pursued only "in lieu of" a suit in federal district court, which the Wises pursued as early as 2013. *See Wise v. USDA*, No. 4:14-CV-234-BO (E.D.N.C.).

On the Wises's second argument in support of their First Motion for Reconsideration, the court held that the they had failed to demonstrate the applicability of the relevant moratorium provisions, 7 U.S.C. § 1981a(b) and 7 C.F.R. § 766.358(a), in the instant case. In particular, the court reasoned that the regulations cited by the Wises, 7 C.F.R. § 15.1 *et seq*., were inapplicable as to the USDA and, thus, the Wises's unsubstantiated claims that they filed a program discrimination complaint under those regulations was not sufficient to carry their burden to demonstrate that the moratorium provisions applied. Moreover, relying on 7 C.F.R. § 766.358(a), the court held that the 2013 suit operated to bar the Wises's complaint, where their ECOA claim had been "closed by a court of competent jurisdiction." *Id.* Finally, on the Wises's third argument, the court denied the Wises's motion to transfer, relying on its conclusion that they were not members of the *Pigford* class. The court's judgment entered the same day.

On November 23, 2015, the Wises noted a timely appeal of the court's judgment. *United States v. Wise*, No. 15-2477 (4th Cir.). Also on that day, the Wises filed a motion to stay the court's judgment pending appeal. Therein, the Wises argued they likely would succeed on the merits of their appeal for four reasons. First, the Wises contended that they were likely to succeed because their 2015 administrative complaint, filed with the USDA's OALJ, triggered a moratorium that prohibited the government from pursuing further these foreclosure proceedings. Second, the Wises argued that they were likely to succeed on appeal

because they were members of the *Pigford* class. In particular, they argued that class membership entitled them to a hearing before the USDA Third, the Wises argued that court erred in dismissing their counterclaims because the doctrine of res judicata did not apply to bar their official capacity suits against the various USDA employees. Fourth, and finally, the Wises argued that the court should stay enforcement of the judgment because this court lacked jurisdiction to adjudicate their ECOA claim against the USDA. Rather, the Wises, relying on their contention that they were part of the *Pigford* consent decree, argued the court should have transferred their counterclaims to the Court of Federal Claims, which has jurisdiction to enforce settlement agreements against the government.

On February 25, 2016, the court entered order denying the Wises's motion to stay enforcement of the judgment, concluding, as to each of their arguments, that the Wises had failed to demonstrate a likelihood of success on the merits. *United States v. Wise*, No. 5:14-CV-844-FL, 2016 WL 755627 (E.D.N.C. Feb. 25, 2016) (the "*Stay Order*"). On their first argument, the court held that the Wises had failed to demonstrate that their complaint with the USDA's OALJ would trigger the statutory or regulatory moratorium provisions. On their second argument, the court held that the Wises had failed to demonstrate that they were members of the Pigford class. On their third argument, the court concluded that it had not erred in dismissing, on the basis of res judicata, the Wises's counterclaims against the USDA employees in either their individual or official capacities. With respect to the individual-capacity counterclaims, the court held that the Wises either had asserted, or should have asserted, those counterclaims as part of the 2013 suit. With regard to the official-capacity counterclaims, the court held that the Wises's 2013 suit against the USDA barred their counterclaims against the USDA employees in their official capacities and that, in any event, res judicata barred those official-capacity claims because they should have been brought as part of the 2013 suit. Finally, on their fourth argument, the court concluded that the Court of Federal Claims would lack jurisdiction over the Wises's ECOA claims, thus rendering their argument without merit.

On March 2, 2016, the Wises filed the instant motion to reconsider the *Stay Order*. Again, the Wises argue the effect of the *Pigford* consent decree. In particular, the Wises argue that the court should reconsider the

Stay Order to correct a clear legal error, where they are members of the *Pigford* class, which entitles them to an adversarial hearing before the USDA before the government may foreclose on their property. Relatedly, the Wises suggest that reconsideration of the *Stay Order* is proper because the government's attempt to foreclose is a breach of the *Pigford* consent decree, which must be adjudicated by the Court of Federal Claims. In addition, the Wises raise the effects two pieces of legislation, one unpassed, on their ECOA claims. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 § 14012 (2008); *Pigford* Claims Remedy Act of 2007, S. 515, 110th Cong. § 2 (2007); S. 1989, 110th Cong. § 2 (2007); H.R. 3073, 110th Cong. § 2 (2007); H.R. 899, 110th Cong. § 2 (2007). Apart from their *Pigford*-related arguments, the Wises also argue that they are entitled to a moratorium under the previously-asserted statutory and regulatory moratorium provisions, 7 U.S.C. § 1981a(b) and 7 C.F.R. § 766.358(a). Finally, the Wises again suggest that the court erred in dismissing their counterclaims on the basis of res judicata.

II. COURT'S DISCUSSION

A. Standard of Review

Rule 60(b) authorizes the court to "relieve a party ... from a final judgment, order, or proceeding for ... (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ... (3) fraud ... (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). Under Rule 60(b), a movant first must demonstrate that the movant acted promptly, that the movant has a meritorious claim or defense, and that the opposing party will not suffer prejudice by having the judgment set aside. *See Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 264 (4th Cir. 1993); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988) (per curiam). If those three threshold conditions are met, the court then must determine whether the movant has satisfied "one of the six enumerated grounds for relief under Rule 60(b)." *Gray*, 1 F.3d at 266.

B. Analysis

The Wises's motion for reconsideration properly is denied because it does not raise any new argument not previously addressed by the court. On a motion for reconsideration, as with a motion for stay, the burden is on the movant to establish his or her entitlement to relief. *See Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989) (holding movant bears burden in proving entitlement to reconsideration); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (holding movant bears burden in motion for stay). A motion for reconsideration is not proper where an argument already has been fully considered and rejected. *See Projects Mgmt. Co. v. Dyncorp Int'l, LLC*, 17 F. Supp. 3d 539, 542 (E.D. Va. 2014).

Time and time again, the Wises have raised the same arguments. And each time, the court has roundly rejected them. The Wises's displeasure with the outcome of this suit is apparent. The consequences of the court's judgment are serious, and at each stage of this proceeding the court has attempted to address the Wises's arguments with voluminous explanation and a degree of solemnity commensurate with the magnitude of its judgment. The court has studied, with little assistance from either party, the many and sometimes-less-than-clear regulations governing FSA foreclosure proceedings, as well as the regulations governing the FSA, the OALJ, and the various types of discrimination complaints handled by the USDA's Assistant Secretary for Civil Rights ("ASCR") through the USDA's Office of Civil Rights ("OCR"). Each time, the court has concluded that these regulations, along with their governing statutes, offer the Wises no relief. Certainly, the Wises are entitled to dispute that conclusion, as they presently do. However, mere displeasure, disagreement, or divergence of mind is an insufficient basis upon which to rest a motion for reconsideration. Just because the Wises believe a statute or regulation carries a particular meaning does not make it so.

In addition, the court encourages the Wises to take full advantage of Federal Rule of Appellate Procedure 8, which authorizes the court of appeals to stay enforcement of the district court's judgment, if such stay is denied by the district court. In so doing, the court observes that the Wises already have a fully briefed motion to stay pending before the Fourth Circuit.

1. *Pigford* Arguments

The Wises first argue that reconsideration is proper because they are members of the *Pigford* class and such membership entitles them to a hearing before the USDA as a prerequisite to foreclosure. In addition the Wises argue that the government's present suit represents a breach of the *Pigford* consent decree. However, as the court previously has held, the Wises were not parties to the *Pigford* consent decree because they opted out. Moreover, the *Pigford* consent decree does not apply to claims not existing at the time it was approved by the court. The Wises's 2011 discrimination claim, arising over a decade after the *Pigford* consent decree, is not covered. The Wises have not produced any new evidence and merely rehash old arguments. Thus, their motion for reconsideration is denied on this point.

2. Moratorium Provisions: 7 U.S.C. § 1981a(b) and 7 C.F.R. § 766.358(a)

The Wises next argue that the court should reconsider its order denying their motion for a stay because the government has foreclosed on their property in violation of various moratorium provisions. The statutory provision at issue provides that "effective beginning on the date of the enactment of this subsection, there shall be in effect a moratorium ... on all acceleration and foreclosure proceedings instituted by the [USDA] against any farmer or rancher who ... files a claim of program discrimination that is accepted by the Department as valid." 7 U.S.C. § 1981a(b). Similarly, the associated regulation provides that "borrowers who file or have filed a program discrimination complaint that is accepted by" OCR and have been "serviced to the point of acceleration or foreclosure on or after May 22, 2008, will not have their account accelerated or liquidated until such complaint has been resolved by USDA or closed by a court of competent jurisdiction." 7 C.F.R. § 766.358(a). However, neither of these provisions afford the Wises any right to a stay of the court's judgment.[3]

[3] In the *Reconsideration Order*, the court reviewed the substance of the Wises's program discrimination complaint and reasoned that the Wises had failed to demonstrate the moratorium provisions applied because their program discrimination complaint cited only the regulations enforcing Title VI of the Civil Rights Act of 1964. 7 C.F.R. § 15.1 *et seq.* However, the language used in that order is imprecise, and suggests that the Wises's

First, although the Wises filed a program discrimination complaint against the USDA, they have submitted no evidence that it was "accepted as valid." A complaint of program discrimination must be submitted to the USDA's Office of Adjudication, a subdivision of the USDA's OCR. 7 C.F.R. § 766.358(a). However, merely filing a program discrimination complaint does not trigger a moratorium. 7 U.S.C. § 1981a(b); 7 C.F.R. § 766.358(a). Rather, a moratorium applies only after the claim is "accepted as valid." 7 U.S.C. § 1981a(b); 7 C.F.R. § 766.358(a). Filing and acceptance are discrete steps. *See* Loan Servicing; Farm Loan Programs, 74 F.R. 39565-01, 2009 WL 2407352, at *39566 (Aug. 7, 2009). A program discrimination complaint is "accepted" once it has been reviewed "on basic procedural grounds." *Id.*

The Wises's program discrimination complaint was filed with the OCR, at earliest, on November 17, 2015. *See Wise*, No. 16-2, 2015 WL 9241444 (U.S.D.A. Nov. 17, 2015) (dismissing complaint as filed in incorrect office). However, it does not follow that it was "accepted as valid" that same day. The filing and "acceptance" of a complaint are discrete steps, with only the latter triggering a moratorium. *See* 7 C.F.R. § 766.358; *see also* 74 F.R. 39565-01, 2009 WL 2407352, at *39566. The Wises have produced no evidence to suggest that their program discrimination complaint was "accepted as valid" prior to the court's November 18, 2015 judgment. Thus, they have failed to carry their burden.

Second, the court has grave and serious doubts about whether the Wises's program discrimination complaint ever could be "accepted as valid." All program discrimination complaints "must be filed within 180

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filing of the their [sic] 2013 suit was the putative moratorium-triggering event. The court herein takes the opportunity to clarify that analysis. The Wises's First Motion to Reconsider failed to demonstrate that the complaint they filed with the USDA actually could be "accepted as valid," thus triggering a moratorium, because the ground for relief asserted therein—in particular, relief under Title VI of the Civil Rights Act—does not apply to the USDA. *See Reconsideration Order*, 2015 WL 7302245, at *9. The court's apparent reference to the Wises's 2013 suit actually is a reference to the allegations raised in that suit, which also were raised in their counterclaims in the instant action, as well as their program discrimination complaint. So restated, this ground also supports denying the Wises's instant motion.

calendar days from the date the person knew or reasonably should have known of the alleged discrimination, unless the time is extended for good cause by the ASCR or [his] designee." 7 C.F.R. § 15d.5. The Wises's program discrimination complaint alleged discrimination occurring in 2012; however, it was not filed until late 2015, more than 2.5 years outside the 180 day limitations period. (*See* DE 72-3).

Third, and finally, it is dubious that, even if the Wises's complaint of program discrimination were accepted as valid, it could be used to stall the sale of their property. Pursuant to § 766.358(d), the moratorium provisions do not apply when an account already is in foreclosure at the time a program discrimination complaint is filed. *See* 74 F.R. 39565-01, 2009 WL 2407352, at *39566. The Wises's account was accelerated, and thus in foreclosure, no later than April 1, 2015, the day after the court of appeals mandate issued following the Wises's appeal of their 2013 suit. *See* 7 C.F.R. § 766.358(c) (describing the date of acceleration); *id.* § 766.358(d). Thus, as of that date, the moratorium provisions no longer were applicable. *See* 74 F.R. 39565-01, 2009 WL 2407352, at *39566. The Wises's program discrimination complaint was not filed until some six months later.

In sum, the Wises's motion for reconsideration properly is denied as to their second, moratorium argument.

3. Res Judicata

The Wises finally argue that the court should grant their motion for reconsideration of the *Stay Order*, because they are likely to succeed on their res judicata arguments on appeal. The Wises raise no new argument with respect to the court's earlier res judicata analysis. Thus, the court rests on its prior order and the Wises's motion for reconsideration is denied on this point.

III. CONCLUSION

Based on the foregoing, the court DENIES the Wises's motion to reconsider the court's February 25, 2016, order denying a stay of its judgment pending their appeal. (DE 84).

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FEDERAL CROP INSURANCE ACT

DEPARTMENTAL DECISIONS

In re: STEVE LANE.
Docket No. 15-0043.
Decision and Order.
Filed April 5, 2016.

FCIA.

Mark R. Simpson, Esq. for Complainant.
George H. Rountree, Esq. and Robert F. Mikell, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

This is a proceeding under section 515(h) of the Federal Crop Insurance Act [Act], (7 U.S.C. § 1515 *et seq.*), alleging violations of the Act by Steve Lane [Respondent], as provided under section 1515(h)(3)(A) and (B). On December 11, 2014, the Manager of the Federal Crop Insurance Corporation [FCIC; Complainant] filed a complaint against Respondent pursuant to section 515(h) of the Act (7 U.S.C. § 1515(h)(3)(A) and (B)), the regulations published at 7 C.F.R. part 400, subpart R, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under the Various Statutes (7 C.F.R. part 1, subpart H). The record in this matter is now closed, and the matter is ripe for the instant Decision and Order.[1] In reaching my conclusions, I have considered all documentary and testamentary evidence and the arguments of the parties.

I. ISSUES

Whether Respondent willfully and intentionally provided false or inaccurate information with respect to a policy or plan of insurance to

[1] In this Decision and Order, Complainant's exhibits shall be identified as "CX-#," and Respondent's exhibits shall be identified as "RX-#." References to the transcript of the hearing shall be denoted as "Tr. at [page #]."

FCIC or any approved insurance provider, or failed to comply with a requirement of FCIC.

II. PROCEDURAL HISTORY

Complainant filed its Complaint against Respondent on December 11, 2014. The Complaint alleges that Respondent collected proceeds for losses that he did not incur and seeks the assessment of a civil fine against Respondent and his disqualification from the program. On December 30, 2014, Respondent filed an answer denying the allegations. Counsel for Respondent entered their appearance on January 6, 2015. By Order issued February 5, 2015, I set deadlines for the exchange of evidence and filing of lists of exhibits and witnesses. On March 30, 2015, Complainant filed the required lists, and on May 7, 2015, Respondent filed its lists.

By Order issued May 27, 2015, I set the date for commencement of a hearing in the matter in Savannah, Georgia. The hearing commenced as scheduled on June 23, 2015 and continued through June 24, 2015. At the hearing, I admitted to the record Complainant's exhibits CX-1 through CX-23 and Respondent's exhibits RX-1 through RX-36.

On September 25, 2015, Respondent moved to admit post-hearing evidence into the record and requested an extension of time to file post-hearing argument. Complainant requested additional time to address the motion, which I granted by Order issued September 25, 2015. By order issued October 26, 2015, I granted Respondent's Motion over Complainant's objection filed October 22, 2015 and admitted the evidence to the record. I hereby identify the evidence as RX-37. I set new deadlines for the filing of the parties' written closing argument.

Respondent filed closing argument on December 9, 2015.[2] Complainant filed its closing argument on December 11, 2015. Neither party moved for permission to file sur-reply to opposing closing argument, but on January 8, 2016, Respondent filed a sur-reply. On January 11, 2016, Complainant filed a response to Respondent's submission.

[2] Respondent filed its closing argument first by facsimile, then by email, and then by post.

III. STATEMENT OF THE CASE

A. Summary of the Evidence

Respondent Steve Lane grew up on a farm in Georgia and continued farming his family farm as an adult (Tr. at 292-295). When Mr. Lane began farming on his own, he purchased crop insurance through his agent Chris Webb, and he continues to use Mr. Webb's services (Tr. at 295; RX-14, RX-15, RX-18). Respondent relies on his agent to fill out forms and he provides the agent with information requested by USDA (Tr. at 295-296).

In 2006, Respondent grew a good crop of tobacco but decided not to sell it all because the price was not good for the color of his crop (Tr. at 296-297). He did not make a crop insurance claim but stored the tobacco, intending to sell it when prices rose (Tr. at 297). It was the first time Mr. Lane had carried over tobacco (Tr. at 308-309). The market for his tobacco did not improve in 2007 or 2008 (Tr. at 298-307). In 2009, Mr. Lane decided to sell the tobacco regardless of price because it risked going bad in storage (Tr. at 308).

Mr. Lane described the process of planting in the spring, then harvesting by hand and machine and curing tobacco in his barns (Tr. at 299-301). The tobacco is then baled and taken for grading (Tr. at 302). His crop in 2006 was irrigated (Tr. at 310-311). Mr. Lane keeps records of bales of tobacco by barn number on "slip sheets," which are attached to bales; he documents the barn and the bale on his own records (Tr. at 303).

Mr. Lane was aware that he needed to give his agent, Mr. Webb, all of his sales receipts, and he did so; however, he was not aware that he needed to report his stored crop from 2006 (Tr. at 308-309, 311). Mr. Lane believed that because he met his production in 2006 and did not make a crop insurance claim, the tobacco that he stored was entirely his own business (Tr. at 309-310). His failure to report the crop did not impact anything, and he explained that a certain kind of insurance made it optional to sell or store his crop (Tr. at 310-311).

FEDERAL CROP INSURANCE ACT

In 2009, Mr. Lane grew tobacco on his own irrigated parcel and on non-irrigated acreage that he leased (Tr. at 313). He recalled that when the weather started to turn dry in June, he became concerned that his non-irrigated crop would not reach maturity and he reported a potential loss to his insurance agent (Tr. at 314). Mr. Lane acknowledged a notice of loss from wind damage, but he did not recall any specifics about wind damage (Tr. at 315-316; C.X-10). He also filed a notice of loss from drought for the crop on the non-irrigated land (Tr. at 317; CX-11). Mr. Lane did not remember if an agent or adjustor came to look at the crop, but he acknowledged documents dated August 12, 2009, which reflect an inspection of his crop (Tr. at 318-319; CX-12).

Because of the lack of rain early in the growing season, much of the tobacco did not ripen (Tr. at 319). Mr. Lane harvested what he could, cured it in his barn and then sold it along with the irrigated tobacco to the Stabilization Cooperative in Nashville (Tr. at 320-321). Respondent's guarantee on the dry land crop was 66,440 pounds and he produced only 13,309 pounds because he did not harvest the unripened crop (Tr. at 340-341). No one came to look at his crop at harvest time (Tr. at 341). Ned Day came when he filed his notice of claim, but Respondent did not think he needed to file another notice after the harvest showed his actual losses (Tr. at 342). He did not inform anyone in the government about his loss, but followed the instructions he had been following for years and reported his production (Tr. at 342-345).

In 2009, Respondent tried to sell his carry-over tobacco from 2006 to his usual buyer, but they refused it because it was dark (Tr. at 322). He sold carry-over tobacco from 2006 to Mr. Boyett at Blackshear (Tr. at 322-325; 362). He did not report the sale of the 2006 tobacco on his claim for loss on the 2009 crop because Mr. Lane did not think it was relevant (Tr. at 326-327).

Mr. Lane could not specifically remember selling "trash" tobacco in 2009, but he verified that he usually picked burnt and other less developed leaves throughout the season and bundled it together to be sold separately at the end of the season (Tr. at 389). He did not consider the carry-over tobacco to be in the same category (Tr. at 390).

Respondent recalled being interviewed by RMA investigator Randy Upton, and he recalled signing a written statement, but he did not really focus on the interview, as he was anxious to get to work hauling peanuts (Tr. at 327-328).

Christopher Webb has been Mr. Lane's crop insurance agent for some time, and he has renewed Respondent's policies and prepared reports for him (Tr. at 29-30). A farmer's coverage is based in part upon his previous year's production, which Mr. Lane reported on an annual form (Tr. at 30; CX-7). Mr. Webb also prepared an acreage report that documents what Mr. Lane planted each year (Tr. at 31; CX-8). Mr. Webb prepared these reports for Mr. Lane in 2006, 2007, 2008, and 2009, and Mr. Lane did not report carry-over crop, as he should have (Tr. at 32). The form does not include a special place to report carry-over tobacco, but Mr. Webb would have documented it in the remarks section of the form (Tr. at 34).

On August 7, 2009, Mr. Webb signed a notice of loss on Mr. Lane's tobacco crop due to wind on his usual company form (Tr. at 33-37; CX-10). Mr. Webb was not familiar with the notice of loss form identifying loss due to drought, and testified that he had not prepared it (Tr. at 37; CX-11). He first saw the form when contacted by counsel for the government (Tr. at 43). Mr. Webb stated that he always prints the information, unlike the writing on the drought notice, and further, information that he would normally include was omitted on that notice (Tr. at 38-40). Another inconsistency he observed was that the drought notice includes a claim number, which is assigned by the company after Mr. Webb submits the notice of loss . . . (Tr. at 40).

Mr. Webb further testified that it was irregular to issue a notice of loss on August 7, 2009 that identified a loss in the future, in September 2009 (Tr. at 42). Mr. Webb explained that he would not have looked too closely at notices, because it is the adjustor's job to handle the claims (Tr. at 42-43). Mr. Webb did not know if an adjustor would ever prepare a notice of loss, but it was normal procedure for an agent like himself to prepare such notices (Tr. at 56-57). Mr. Webb was aware that an audit of Respondent's tobacco production had been conducted and Mr. Lane had not reported any carry-over tobacco (Tr. at 44).

FEDERAL CROP INSURANCE ACT

Ned Day is a retired insurance loss adjustor who adjusted Respondent's crop insurance claims in 2009 (Tr. at 68-70). Mr. Day recalled conducting a pre-harvest inspection of Respondent's tobacco crop in August 2009, and then receiving a notice of loss from Respondent's insurer in November or December 2009 (Tr. at 70-71). Mr. Day did not recall seeing a notice of loss for wind damage in 2009 (Tr. at 71-72). Mr. Lane was with Mr. Day when the adjuster prepared a pre-harvest inspection field review (Tr. at 73; CX-12). The report included information about Respondent's crops and guaranteed acreage and a schedule of insurance (Tr. at 74). If a farmer produces less than the guaranteed production, he would receive an indemnity (Tr. at 75).

Mr. Day explained how he appraised Respondent's anticipated production and emphasized that the appraisal was approximate based on the condition of the crop at the time of the appraisal (Tr. at 75-77). At that time, both irrigated and non-irrigated crops looked to be good quality, although the non-irrigated may have had thinner leaves (Tr. at 78). The tobacco was mature, and Mr. Day saw no evidence of wind damage or damage due to drought (Tr. at 78-79).

Respondent provided Mr. Day with information regarding his production in 2009 that showed he had a loss (Tr. at 82-83). Mr. Day asked Mr. Lane if he sold tobacco that was not included in the report, and Mr. Lane advised that he was unable to sell it (Tr. at 84). Mr. Lane should have reported that tobacco so that the insurance company could have adjusted the claim in consideration of the unsold crop (Tr. at 84).

Mr. Day explained that the form that showed a "claim number" actually showed Mr. Lane's insurance identification number (Tr. at 96). His figures were based upon a sample of plants along a sample of rows. Tr. at 100-104. Mr. Day had never had an appraisal miss as much as the one he conducted of Respondent's 2009 tobacco crop. Tr. at 110. He acknowledged that the production number looked suspicious. Tr. at 111.

Randy Upton is a special investigator for the Risk Management Agency [RMA] for USDA (Tr. at 113). Mr. Upton conducted an investigation into Georgia tobacco producers, including Respondent, which spanned several years (Tr. at 113-115). Mr. Upton reviewed Respondent's 2009 notices of claim and appraisal and production

documents, and concluded that Respondent's production should have been greater than he reported (Tr. at 115). Mr. Upton interviewed Mr. Lane in the presence of a tobacco expert and recorded and made a written record of the interview (Tr. at 116; CX-18; CX-19). Mr. Lane denied selling tobacco to Independent Tobacco Service [ITS] and said that he only sold to Stabilization in 2009 (Tr. at 117). When confronted with documentation of the sale of 26,000 pounds of tobacco to ITS, Respondent speculated that the sale represented trash tobacco (Tr. at 117).

Mr. Upton testified that Respondent's guarantee on the irrigated acreage was 71,100 pounds and he had reported actual production of 101,000 pounds, which was approximately 30,000 pounds above the guarantee. Mr. Upton suspected that there could have been shifting of production since Respondent reported producing only 309 pounds per acre on the other lot versus the 2,007 pounds that was estimated by the loss adjuster (Tr. at 116-130; CX-18). The photographs of Respondent's crop suggested that it was healthy, and Mr. Upton could not conceive of an explanation for the shortage of tobacco claimed by Respondent (Tr. at 124). Mr. Upton believed that the tobacco that Respondent sold to ITS consisted of tobacco that he did not account for from the non-irrigated acreage and not carry over tobacco (Tr. at 125; CX-15). Respondent had not reported carry over tobacco, although his policy required him to do so (Tr. at 129; CX-6).

Mr. Upton concluded that Respondent had misrepresented losses, and GAIC followed his recommendation to void Respondent's crop insurance policy (Tr. at 130). During Mr. Upton's interview with Respondent, Mr. Lane mentioned having carry over tobacco that Mr. Upton believed to be the same as "trash tobacco" (Tr. at 135). Mr. Upton agreed that from the price Respondent was paid that the tobacco was "trash," and he also admitted that he had no idea where the tobacco came from or when it was grown (Tr. at 157-158). Mr. Lane participated in the interview for two hours and did not express his need to leave to work on the peanut harvest (Tr. at 137). Mr. Upton researched the weather in Respondent's area during the summer of 2009 and did not find reports of drought conditions (Tr. at 136).

Mr. Upton was not convinced that Respondent sold all of his 2009 tobacco to Stabilization because he had not reported carry over tobacco in 2006 or thereafter, and "he had only produced 300 pounds per acre when he was supposed to have produced the 2,007 pounds per acre" on the non-irrigated acreage (Tr. at 159). Mr. Upton also concluded that insurance adjustor Ned Day misrepresented that there was a loss from drought, and that, contrary to Mr. Day's assertions, Mr. Day prepared the package showing the loss (Tr. at 172).The number of pounds that Respondent produced on the irrigated land in 2009 exceeded his guarantee at a level almost equivalent to the loss Respondent reported on the dry land crop, and Mr. Upton suspected shifting of the crop (Tr. at 178-181). RMA concluded that Respondent had misrepresented material and relevant facts pertaining to the acreage report, notice of loss, and production worksheet associated with policy and, as a result, GAIG voided Respondent's 2009 tobacco policy and issued a notice of premium overstatement of $20,664 and indemnity overpayment of $104,429 (CX-23).

Joseph Boyett has been a farmer all of his life, and he grew tobacco and ran a tobacco warehouse in Blackshear, Big Z Planters, from 1976 to 2006 (Tr. at 216-217). He also bought tobacco for ITS (Tr. at 217). In 2009, Mr. Boyett bought a lot of low grade tobacco that he sold for .40 or .50 cents a pound to "Tobacco Rag" (Tr. at 217-218). He testified that "trash tobacco" came from a variety of sources, such as poorly cured tobacco, poorly grown tobacco, or tobacco that could not be graded for sale to usual buyers (Tr. at 218, 223). Since 2009, most independent dealers have bought trash tobacco for sale to foreign markets (Tr. at 218-219).

Mr. Boyett had not met Respondent before he sold trash tobacco to ITS in 2009, but he confirmed that invoices showed the sales. Tr. at 219-222; CX-13; RX-20. He explained that if growing conditions were unfavorable, an entire field could produce a crop of trash tobacco, but that the invoices of Respondent's sales did not amount to 40 acres of tobacco. Tr. at 224-226. Mr. Boyett was familiar with carry over tobacco, but he believed that a crop of trash tobacco carried over for years would not be worth anything. Tr. at 226-227.

Mr. Boyett did not categorize dark tobacco as trash and asserted that it sometimes was desirable, as it could be sweeter and higher in nicotine (Tr. at 224). He explained that most American companies prefer lighter tobacco, and they purchase different colored tobacco to accommodate the market (Tr. at 230-231). Mr. Boyett testified that lack of moisture during the growing season could create a crop that is green (Tr. at 233-234).

Allen Denton grew up on a farm and worked with his family's tobacco crop from the age of ten until after high school (Tr. at 236). After two years of military service, Mr. Denton returned to farming in 1974 and then worked first as an adjustor and then as a field representative with RMA's crop insurance program (Tr. at 236-237). In 1987, he was employed by the Farm Service Agency of USDA as the chief compliance officer and field reporter (Tr. at 237). He supervised adjustors, appraised tobacco crops, and adjusted loss claims (Tr. at 238). In 2014, Mr. Denton retired from his job of twelve years as a compliance investigator with RMA (Tr. at 235-236). In that position, he reviewed claims for compliance with RMA's policy and regulations and made determinations regarding possible fraud and reduction in indemnity payouts (Tr. at 238).

Mr. Denton carried crop insurance during his years farming and recalled filing one loss claim due to hail (Tr. at 238-239). He never experienced drought (Tr. at 239). Mr. Denton described the typical tobacco growing and harvesting process (Tr. at 239-242, 247-249). He testified that based upon the date that Respondent planted his non-irrigated tobacco and the date on which a picture of the crop was taken, the tobacco was mature and ready to be harvested (Tr. at 243-247; CX-13 at 17). If the crop is left in the field and not harvested at the proper time, it would cause the crop to deteriorate and result in reduced production (Tr. at 249-250). Mr. Denton believed that only a catastrophic event would have prevented Respondent's crop from producing 2,000 pounds per acre, as appraised on August 12, 2009 (Tr. at 250-251). Mr. Denton further asserted that in 2009 it would be uncommon to have carry-over tobacco crop (Tr. at 252).

Mr. Denton assisted Mr. Upton in his investigation into Respondent's claim of loss (Tr. at 258-260). The investigation concluded

> [t]hat the tobacco was planted timely. That there was no damage to the tobacco that the adjuster could determine based on his appraisal and the pictures that he took. And that Mr. Day also said himself in the interview that the tobacco was a very good crop and he could not understand why there would have been a loss.

(Tr. at 269-270). Mr. Denton and Mr. Upton speculated that the tobacco that Respondent reported as a loss was sold somewhere else and not reported (Tr. at 270). He was aware that Respondent had sold tobacco to ITS (Tr. at 271).

Dan Johnson testified that he has been a farmer all his life and has farmed in Emanuel and Bullock counties (Tr. at 450-451). Mr. Johnson suffered a loss of his corn crop from drought in 2009 and filed a crop insurance claim for the loss (Tr. at 451-452,453; RX-8, RX-9). He estimated that the field that suffered the loss was a mile to a mile and one-half from Respondent's dry planted field (Tr. at 452). Mr. Johnson could not recall receiving a payment because it would have been credited against his next year's premium (Tr. at 453-454).

John Paul Johnson has also farmed all his life in many areas, including Emanuel and Bullock counties (Tr. at 462). Mr. Johnson also filed a claim for loss on his corn crop in 2009 due to drought (Tr. at 463; RX-16). He believed he was paid an indemnity but did not know how much (Tr. at 465).

Bobby Lane has farmed all his life and in 2009 filed an insurance claim for loss on a crop[3] grown in Emmanuel County due to drought (Tr. at 470-472; RX-7). He did not recall the amount he was paid for his loss and documents that he reviewed did not note the amount (Tr. at 475-476).

Burt Rocker testified that he was at Respondent's farm sometime in the summer of 2007 and observed that Respondent's barns were full of tobacco (Tr. at 479, 482; RX-12). Mr. Rocker was fishing in Respondent's ponds near his barns and noticed the tobacco because it

[3] On RX-7, it appears as though the crop that suffered damage was peanuts.

would not normally still be in barns at that time of the year (Tr. at 480-482). Respondent leases forty acres of land from Mr. Rocker (Tr. at 481). Respondent told Mr. Rocker that the tobacco was from the previous year (Tr. at 483). Mr. Rocker could not say he looked at all of Respondent's barns, but the barns with open doors were filled with tobacco (Tr. at 487).

Dr. Ricky Lane is a dentist and Respondent's brother (Tr. at 492-493). Dr. Lane grew up on the family farm and returns frequently to visit (Tr. at 493). Dr. Lane recalled seeing tobacco in a warehouse on the farm in the winter months of 2007 and 2008 and thinking it was odd to see tobacco stored at that time of the year (Tr. at 493-494). Dr. Lane completed an affidavit documenting his observations of the stored tobacco at the request of his brother, but he could not say when he was asked to do so (Tr. at 495-496; RX-11; CX-*). Dr. Lane visited the warehouse frequently on Fridays until May 2008, after returning from meetings with his lawyer, because he found the warehouse a soothing place to rest (Tr. at 496-497).

Dr. Lane recalled teasing his brother about not needing the money from the sale of the stored tobacco, but he did not recall the conversation as he was focused on his own personal problems. Tr. at 499-500. Although he could not say how much tobacco was present, Dr. Lane believed there were at least six to eight bales of it because he used to lean on it during his visits. Tr. at 501-502. The tobacco did not fill the warehouse. Tr. at 503.

Stephen Jeffrey Underwood has a Ph.D. from the University of Georgia in the study of applied climatology, synoptic meteorology, and fluvial geomorphology. Tr. at 510. Dr. Underwood currently is a department chair at Georgia Southern University in the Department of Geology and Geography, and also teaches a course in weather and climate. Tr. at 506-507. Before holding that position, Dr. Underwood was the Nevada State Climatologist for seven years, and was responsible for chairing the Governor's Drought Review and Reporting Committee, which determined when drought conditions were present. Tr. at 507-509. Dr. Underwood has served on committees studying climate change, has consulted with parties on climate matters, and authored many

publications about weather and climate. Tr. at 511; RX-36. Dr. Underwood testified as an expert witness for Respondent.

In preparing for his testimony, Dr. Underwood reviewed data from the Georgia Automated Environmental Monitoring Network, which the USDA National Agricultural Statistics Service uses for its analysis of metrological conditions in Georgia (Tr. at 515-516). The network uses automated stations that collect photographs north, south, east, and west of the position of equipment and provides written information about the specific equipment (Tr. at 516-517). Dr. Underwood is familiar with the equipment, Campbell Scientific instrumentation, and considers it "state of the art" (Tr. at 517).

In his review, Dr. Underwood focused on stations in Statesboro and Midville, as they were closest to Respondent's farm (Tr. at 517). He looked at daily records of weather from April through September 2009 (Tr. at 518-519; RX-26, RX-29). The data from the Midville station showed that April and May were wetter than normal, June and July were drier than normal, and August and September were normal or slightly above normal for precipitation (Tr. at 521-522; RX-26). The data from the Statesboro system from that period showed that April and May were more wet than normal and that June and July were drier than normal (Tr. at 522-523; RX-29). Dr. Underwood explained that in the field of climatology, averages are based on data accumulated over thirty years (Tr. at 523).

Dr. Underwood did not analyze the data from August and September as carefully as the data from earlier months (Tr. at 533). He stated that his "cursory analysis [he] did not think there would be drought conditions in those two months" (Tr. at 533).

Dr. Underwood also reviewed data stored at the National Climatic Data Center [NCDC] in Asheville, North Carolina, which archives all climatic data collected by multiple agencies such as the National Oceanic and Atmospheric Administration and the National Weather Service (Tr. at 527-528). The data from NCDC for the period from June to August 2009 ranked Georgia as a "6" for precipitation, on a scale of "1" being driest and "115" being wettest, based upon data collected over 115 years (Tr. at 529-530). The data showed that the period from June through

August was the sixth driest recorded over the 115-year-record here (Tr. at 531).

Wesley Harris has a degree in agricultural engineering and served as the County Extension Director in Burke and Bulloch counties and as a policy analyst and educator for the Center for Agribusiness Economic Development (Tr. at 534-536). He currently works with Bulloch Gin to support the customers of the Gin in cotton production, peanut production, and various other commodities and also acts as a consultant on all aspects of agriculture (Tr. at 538). When he began his position as Extension Director in Bulloch County in 1993, he became familiar with tobacco producers, and his role was to support them and their crop (Tr. at 537). Mr. Harris had no experience with Respondent when he served as Extension Director (Tr. at 538).

Mr. Harris reviewed records from the automated weather stations at Midville and at Statesboro, Georgia (Tr. at 539-540; RX-26, RX-29). The data maintained by the system was critical to his work in providing assistance to farmers (Tr. at 540).

Mr. Harris visited Respondent's farm the week before the hearing and also visited the leased acreage where Respondent grew the unirrigated tobacco in 2009 (Tr. at 541). He observed a healthy crop of peanuts planted in the field under conditions that led him to conclude that Respondent "was an accomplished producer" (Tr. at 541). He also noticed that the west end of the field was more "pebbly" and that the field became sandier in elevated areas (Tr. at 541-542). Mr. Harris considered the soil compatible with growing tobacco and explained that most Georgia soil has limited water holding capacity and that, without regular rainfall or supplemental irrigation, it is difficult to successfully produce a crop (Tr. at 542).

Mr. Harris examined the photograph of Respondent's tobacco crop taken on August 12, 2009 and confirmed that it depicted the field he had seen (Tr. at 542; RX-11). He described the typical processes involved in growing and cultivating tobacco, including how fields are generally watered (Tr. at 543-549). Mr. Harris opined that wet weather in the early part of the season would have "a deleterious effect" on the plants (Tr. at 549). He explained that dryland tobacco exposed to a combination of

early wet conditions and a combination of heat and dry weather could fail (Tr. at 549). Mr. Harris believed that tobacco needs an inch and a quarter to an inch-and-a-half of water per week during hot conditions (Tr. at 550). Without sufficient water, the plant will not ripen, although it will create "a nice leaf" (Tr. at 550-551).

Mr. Harris explained the ripening process and stated that "ripe tobacco normally is going to have a yellow, very yellow cast to it" (Tr. at 551-552). He examined a photograph of tobacco in a field and concluded from its color and condition that it was ripe and" ready for harvest" (Tr. at 552-553). In some instances, the crop doesn't ripen as much as a farmer would like, and the greener leaves would not cure as well and would be graded lower (Tr. at 553). Considering the weather data from the tobacco growing season of 2009, Mr. Harris concluded that

> [i]t would have been an extremely challenging year. There's no way with the heavy impact of the saturated soils right after transplanting and then another shot right after that that we would have developed the root system to the point that we could sustain the type of dry hot weather that we had during the primary growth point of the season.

(Tr. at 554). He concluded that high temperatures, and an extended period without significant rain would interfere with creating a successful crop. (Tr. at 554-555). Mr. Harris viewed a photograph of Respondent's dry land tobacco and concluded that the image depicted tobacco that was not maturing and ripening as it should have, based on its dark green color (Tr. at 555-556; CX-12). Mr. Harris was unable to say that the photograph of the tobacco grown with irrigated showed a riper crop than the non-irrigated crop and admitted that it was difficult to determine the maturity of the crop from the picture (Tr. at 578-579; CX-12).

1. Statutory and Regulatory Authorities

The provisions of the Federal Crop Insurance Act [FCIA; the Act], 7 U.S.C. § 1515 *et seq.*, and prevailing regulations found at 7 C.F.R. Part 400 apply to this case. The Act is designed to "promote the national welfare by improving the economic stability of agriculture through a

sound system of crop insurance." 7 U.S.C. § 1502. The crop insurance program is operated by the Federal Crop Insurance Corporation [FCIC], a quasi-governmental entity, with some administration by the RMA, which imposes a number of conditions and restrictions governing eligibility for coverage. The Act limits the authority to insure crops to "producers of agricultural commodities grown in the United States" against losses from "drought, flood or other natural disaster." 7 U.S.C. § 1508(a)(1).

FCIC essentially operates the crop insurance program, and RMA is responsible for authoring crop insurance handbooks, loss-adjustment manuals, and other materials. *See* CX-1. The RMA implements a standard crop insurance contract, which sets a number of obligations and deadlines on behalf of the parties to the contract and specific to the crop covered by the insurance (CX-4, CX-5; RX-14, RX-15, RX-18).

USDA's Farm Service Agency [FSA] is also involved in the administration of the crop insurance program by demanding acreage reports and by maintaining records, including aerial photography, to measure the amount of acreage that farmers plant with various crops. FSA records may be resourced to determine crop-insurance coverage.

The Common Crop Insurance Policy and the Crop Revenue Insurance Policy required for coverage under the Act mandate the types of coverage provided for crop insurance. The insurance policy is actually a contract between the producer (farmer) and the designated insurance company. The regulations set forth Definitions that establish the responsibility of participants in the crop insurance program to comply with requirements:

> Requirements of FCIC. Includes, but is not limited to, formal communications, such as a regulation, procedure, policy provision, reinsurance agreement, memorandum, bulletin, handbook, manual, finding, directive, or letter, signed or issued by a person authorized by FCIC to provide such communication on behalf of FCIC, that requires a particular participant or group of participants to take a specific action or to cease and desist from a taking a specific action (e-mails will not be considered

> formal communications although they may be used to transmit a formal communication). Formal communications that contain a remedy in such communication in the event of a violation of its terms and conditions will not be considered a requirement of FCIC unless such violation arises to the level where remedial action is appropriate. (For example, multiple violations of the same provision in separate policies or procedures or multiple violations of different provisions in the same policy or procedure.)

7 C.F.R. § 400.452.

A violation of a program requirement is defined as "each act or omission by a person that satisfies all required elements for the imposition of a disqualification or a civil fine contained in § 400.454." 7 C.F.R. § 400.452. "Willful and intentional" acts include providing

> false or inaccurate information with the knowledge that the information is false or inaccurate at the time the information is provided; the failure to correct the false or inaccurate information when its nature becomes known to the person who made it; or to commit an act or omission with the knowledge that the act or omission is not in compliance with a "requirement of FCIC" at the time the act or omission occurred. No showing of malicious intent is necessary.

7 C.F.R. § 400.452. The definitions further provide that no proof of specific intent is required

> [w]hen a person, with respect to a claim or statement [h]as actual knowledge that the claim or statement is false, fictitious, or fraudulent; [a]cts in deliberate ignorance of the truth or falsity of the claim or statement; or [a]cts in reckless disregard of the truth or falsity of the claim or statement. . .

7 C.F.R. § 400.452 (Definitions).

The Regulations define a material violation of the Act as one "that causes or has the potential to cause a monetary loss to the crop insurance program or it adversely affects program integrity, including but not limited to potential harm to the program's reputation or allowing persons to be eligible for benefits they would not otherwise be entitled." 7 C.F.R. § 400.452.

2. Discussion

In crop year 2009, the Great American Insurance Company [GAIC] was Respondent's approved insurance provider pursuant to the Act. *See* 7 U.S.C. §§ 1515(h) and 1502(b)(2). GAIC provided coverage for Respondent's flue-cured tobacco in Emanuel County, Georgia under policy number 973633, which was reinsured by FCIA (*See* CX-5). Respondent's acreage of irrigated and non-irrigated tobacco was insured (CX-6). The gravamen of the instant matter is whether or not Respondent experienced loss of his non-irrigated tobacco crop due to drought in 2009 or whether he filed a false claim of loss.

On August 7, 2009, Respondent filed a notice of loss on tobacco due to a windstorm on August 5, 2009 (CX-10). The notice was filed through his agent, Christopher Webb, who recalled preparing the document, and who signed it (*Id*). Another notice of loss dated August 7, 2009 predicted future loss due to drought (CX-11). I credit Mr. Webb's testimony that he had no knowledge of the notice of loss due to drought and observe that the form was prepared in a manner different from the form that Mr. Webb recalled preparing. Mr. Webb prints all of the information he records and does not use cursive, such as appears on the drought form (Tr. at 37; CX-11). In addition, in 2009, Mr. Webb manually prepared forms, while his and Respondent's names and addresses on the notice of loss for drought were typed (Tr. at 38-39; CX-11).

In contrast, Respondent had no clear memory about who prepared the notice of loss for drought, and the insurance adjuster who conducted the field inspection on August 12, 2009, Ned Day, recalled only that he received a notice of loss from Respondent's insurer in November or December 2009 (Tr. at 70-71). Mr. Day's testimony did little to bolster Respondent's very patchy memory, and the fact that Mr. Webb had no

knowledge of the drought notice of loss makes it suspicious. Respondent testified that he relied "entirely" on Mr. Webb to fill out claims and other insurance related documents, yet Respondent bypassed Mr. Webb in this instance (Tr. at 402). Moreover, the field review report prepared by Mr. Day on August 12, 2009 bears handwriting that is very similar to the writing on the notice of loss for drought (CX-12, CX-11). I find that the notice of loss for drought is not a reliable indicator of loss, as it was not handled in the usual manner, was not prepared by Respondent's agent, and represents a predicted rather than an actual loss.

The preponderance of the evidence supports the conclusion that Respondent did not suffer the loss that he reported. Respondent's testimony is problematic in many respects. His ability to recall the circumstances involved in selling tobacco in 2009 varied, just as it had when he was interviewed by Investigator. During that interview, Respondent denied selling tobacco to ITS until he was confronted with sale records (CX-18). He then speculated that the sale was of trash tobacco from his 2009 crop (CX-19). At a meeting in December of 2012 with Mr. Upton and an Assistant United States Attorney, Respondent said that the tobacco was carry-over tobacco (CX-21). At the hearing before me, Respondent admitted that he was not truthful with Mr. Upton (Tr. at 387-388).

Respondent's explanation for carrying over tobacco is not supportable. Respondent maintained that tobacco would deteriorate every year that it is stored, or at least turn darker, which was the reason he could not sell it in the first place. Mr. Boyett agreed that tobacco carried over for years would be worthless (Tr. at 226). Despite the risk of further reducing its value, Respondent purportedly kept the tobacco in question for three years. Respondent also testified that the carry over tobacco was of high quality, but he got a very minimal price for it and sold it as trash.

Despite the testimony of witnesses who vouched for Respondent's honesty, the preponderance of the evidence does not support his version of events. The amount of tobacco that he has said was held over is questionable, given the contradiction between Mr. Rocker's observation that Respondent's barns were full of tobacco when he would have expected the crop to have been sold and Dr. Lane's description of some bales of tobacco that did not fill a warehouse. I accord weight to Dr.

Lane's testimony that Respondent stored some tobacco out of season, but the tobacco could easily have been the bales of trash tobacco that Respondent testified he collects during the growing season.

Respondent undoubtedly sold 25,000 pounds of tobacco to ITS that he failed to report, but the evidence does not establish the source of the crop. I credit Mr. Boyett's testimony that invoices confirmed that Respondent sold him tobacco, but not forty acres worth, which raises the question of what happened to the crop grown on the non-irrigated acreage of Unit 104. Respondent asserted that the crop was mostly lost to drought and that he harvested what he could and left the rest unharvested (Tr. at 340-341). I find that the preponderance of the evidence does not support that drought conditions ravaged the non-irrigated crop.

Despite Respondent's adjustor's August 12, 2009 field inspection that concluded that the crop looked good, Respondent prospectively filed a notice of loss for drought. Although Respondent concluded in August 2009, "that if we didn't start getting some rain I couldn't harvest that tobacco" (Tr. at 314), weather expert Dr. Stephen Underwood "did not think there would be drought conditions in [August and September, 2009]" (Tr. at 533). Tobacco expert Rex Denton testified that twenty-one days without rain after the crop was appraised on August 12, 2009 would have had little effect on the crop (Tr. at 250). Expert Wesley Harris testified that the amount of water needed after August 12, 2009 would not have mattered to the development of the crop (Tr. at 571). Dr. Underwood opined that the period from June to August 6, 2009 was the fifth driest on record, but Mr. Day's inspection on August 12, 2009 revealed a crop that looked good.

Respondent proffered other claims of loss due to drought in 2009, but the evidence failed to establish that the claims were paid. In addition, the record does not establish that the conditions creating a loss of a corn or peanut crop to drought would similarly affect a tobacco crop. The evidence of other claims of loss due to drought has little probative value.

I accord little weight to the opinion of agricultural expert Wesley Harris that wet weather early in the season would have a bad effect on the crop (Tr. at 549), as the rain fell on both irrigated and non-irrigated fields and the irrigated unit produced tobacco in excess of the production

guarantee. I find that Mr. Harris's opinion about the look and color of Respondent's tobacco is not probative, as he did not see the actual plant and could not say which of the two tobacco crops depicted in photographs was more mature (Tr. at 578; CX-12). Similarly, his opinion about the condition of the fields that he inspected in 2015 is immaterial to the condition of the fields in 2009.

I accord substantial weight to Mr. Day's growing-season inspection [GSI] of August 12, 2009.[4] At that time, Mr. Day determined that Respondent's non-irrigated tobacco should produce 2,207 pounds of tobacco per acre, or 97,108 pounds, which would have exceeded Respondent's production guarantee (CX-12). Mr. Day believed that the non-irrigated tobacco appeared to be in excellent condition (Tr. at 79), and when he received Respondent's claim "it was a shock" to him (Tr. at 109).

Mr. Day had never completed an appraisal that missed its mark as much as the August 12, 2009 appraisal for Respondent's Unit 104 (Tr. at 109). In 2009, Respondent reported that he produced 13,394 pounds of tobacco from his non-irrigated field, Unit 104 (CX-15). He produced 83,714 pounds less than his GSI estimated. Respondent certified that he produced 53,046 pounds less than the guaranteed production and that the information on the production worksheet was correct (CX-15). Mr. Day calculated that because of the production deficit for Unit 104, Respondent was due an indemnity payment of $104, 429.00, which yielded a payment of $72,688.00 to Respondent after application of credits due to GAIC.

I find that the preponderance of the evidence supports finding that Respondent intentionally filed a false claim for indemnification under the crop insurance program. I do not find Respondent's testimony creditworthy. He admittedly lied to Investigator Upton during their interview, and although Respondent stated that he was focused on getting back to work, Mr. Upton observed that Respondent participated in the interview without expressing the need to return to work.

[4] Although the handwriting on the drought notice of claim is very similar to Mr. Day's and calls his denial of involvement in the notice of loss into question, his GSI appraisal and testimony are inherently consistent and credible.

Respondent's shifting explanations for the source of more than 25,000 pounds of tobacco sold to ITS further impugn his credibility. Respondent first denied selling tobacco to ITS, then stated that the sales resulted from trash tobacco, which was as much as he could harvest, leaving the unharvested crop in the field (CX-19; Tr. at 320-321, 340-341). He then reported that the tobacco sold to ITS was carry-over tobacco. Respondent's vague and equivocal testimony is not reliable.

It is significant that Respondent s production from his irrigated Unit 101 exceeded his guarantee in 2009 (CX-6). It is speculative to conclude that some of the excess production sold from Unit 101 came from Unit 104. However, the evidence demonstrates that at least some of the 25,000 pounds of the crop sold to ITS represents unreported tobacco harvested by Respondent in 2009, even crediting that some of the tobacco was trash tobacco from the non-irrigated acreage and some carry over tobacco. Therefore, Respondent knowingly and intentionally provided false information when he certified the production worksheet for Unit 104.

I give little weight to the July 9, 2015 Decision of Arbitrator Robert N. Dockson (RX-35). That decision has no precedential value to my findings, and my conclusions are contrary to Arbitrator Dockson's finding that Respondent did not intentionally conceal the existence of carry-over tobacco. The Arbitrator accepted Respondent's contention that the unreported tobacco that he sold was carried over from 2006, and on that basis he overturned GAIC's voidance of Respondent's 2009 MPCI policy and GAIC's finding of an overpayment. I do not know what evidence Arbitrator Dockson relied upon to reach his conclusion, but I reject Respondent's contention that the source of all of the unreported tobacco that he sold in 2009 was carry-over tobacco.

I accept that Respondent carried over some tobacco from some year, crediting Dr. Lane's testimony. The preponderance of the evidence does not support that all of the unreported crop that Respondent sold in 2009 represented the at most dozen bales that Dr. Lane observed repeatedly in the winter months of 2007 and 2008. In addition to failing to accurately report the source of tobacco that he sold in 2009, I find that Respondent failed to report carry-over tobacco in 2006, 2007, 2008, and 2009, which

constitutes a serious lapse in his responsibilities under the crop insurance program.

Respondent's only explanation for not reporting his carry-over tobacco and its sale to anyone involved in the crop insurance program, including his agent Mr. Webb, was that he did not know he should have reported it (Tr. at 375; CX-8). Respondent's ignorance of reporting requirements does not excuse him from failing to comply with FCIC's guaranteed tobacco crop provisions (CX-5). Had he reported the tobacco to his agent, Mr. Webb would have included it in his acreage report (CX-44). Moreover, his assertion that he believed he did not have to report production over his guarantee (Tr. at 309-311) is at odds with his report of excess production from Unit 101 in 2009.

Accordingly, I find that Complainant has established by a preponderance of the evidence that Respondent willfully and intentionally provided false or inaccurate information to RMA and to his insurer regarding a claim of loss of a crop insured under the federal crop insurance program and failed to comply with FCIC reporting requirements.

3. Sanctions

The Act provides for the imposition of sanctions for program noncompliance and fraud. 7 U.S.C. § 1515(h). "A producer, agent, loss adjuster, approved insurance provider, or other person that willfully and intentionally provides any false or inaccurate information to the Corporation or to an approved insurance provider with respect to a policy or plan of insurance…may…be subject to . . . sanctions . . ." 7 U.S.C. § 1515(h)(1). In addition, a producer that "willfully and intentionally fails to comply with a requirement of the Corporation" may be subject to sanctions. 7 U.S.C. § 1515(h)(2).

> If the Secretary determines that a person … has committed a material violation . . . a civil fine may be imposed for each violation in an amount not to exceed the greater of . . . the amount of the pecuniary gain obtained as a result of the false or inaccurate information

> provided or the noncompliance with a requirement of this subchapter; or $10,000.

7 U.S.C. § 1515(h)(3).

> [A]ny person who willfully and intentionally provides any materially false or inaccurate information to FCIC or to any approved insurance provider reinsured by FCIC with respect to an insurance plan or policy issued under the authority of the Federal Crop Insurance Act . . . may be subject to a civil fine . . . and disqualification from participation.

7 C.F.R. § 400.454(b)(1).“[P]articipants who fail to comply with a requirement of FCIC may be disqualified.” 7 C.F.R. § 400.454(b)(2).

I have found that Respondent willfully and intentionally provided false or inaccurate information to FCIC when he certified his production worksheet for Unit 104 with the knowledge that the information was not accurate. I have further found that Respondent willfully and intentionally failed to report the production of tobacco that he carried over for some time.Therefore, I find that Complainant’s requested sanctions are appropriate.

I hereby impose a civil fine of $11,000.00 and disqualify Respondent from participating in the crop insurance program for a period of five years.

IV. FINDINGS OF FACT

1. Respondent Steve Lane operates a farm in the state of Georgia.

2. Respondent was a participant in the Federal crop insurance program at all times pertinent to this adjudication.

3. For the 2009 crop year, Great American Insurance Company [GAIC] was the approved insurance provider pursuant to sections 515(h) and 502(b)(2) of the Act.

4. For the 2009 crop year, GAIC provided crop insurance coverage for Respondent's flue-cured tobacco in Emanuel County, Georgia under policy number 973633. Respondent's policy was reinsured by FCIC in accordance with the Act.

5. For 2009, Respondent insured two separate flue-cured tobacco units: Unit 101 consisted of 45.0 acres that were irrigated, and Unit 104 consisted of 44.0 acres and was not irrigated.

6. Unit 101 was assigned a production guarantee of 71,100 pounds or 1,580 pounds of tobacco per acre, with a liability of $131,535.00.

7. Unit 104 was assigned a production guarantee of 66,440 pounds or 1,510 pounds of tobacco per acre, with a liability of $122,914.00.

8. Respondent selected a coverage level of 75% with a price election of $1.85.

9. Respondent reported planting Unit 101 on April 20, 2009, and Unit 104 on April 10, 2009.

10. On August 7, 2009, Respondent filed a Notice of Loss on Unit 104 due to drought conditions expected to occur in September.

11. On August 12, 2009, insurance loss adjuster Ned Day conducted a growing season inspection of Respondent's insured tobacco and estimated that Unit 101 would produce 2,188 pounds of tobacco per acre and Unit 104 would produce 2,207 pounds of tobacco per acre.

12. Both of Mr. Day's estimates exceeded Respondent's production guarantee.

13. From September 9, 2009, through October 15, 2008, Respondent sold 115,051 pounds of tobacco from Units 101 and 104 to MC Planters Warehouse for $183,557.43.

14. MC Planters Warehouse rejected 75,442 pounds of Respondent's tobacco.

15. Respondent reported that Unit 101 produced 177,099 pounds of tobacco of which 101,657 pounds were sold to MC Planers for $165,042.00, which constituted 30,557 pounds above his production guarantee.

16. Respondent reported that Unit 104 produced 13,394 pound of tobacco, all of which he sold to MC Planters for $18,515.85.

17. Respondent alleged that he did not meet his production guarantee on Unit 104 and suffered a production loss.

18. In December, 2009, Insurance adjuster Ned Day prepared a production worksheet using information provided by Respondent and calculated an indemnity due to $104,429.00 for the loss of tobacco from Unit 104.

19. Respondent signed the production worksheet certifying that Unit 104 only produced 13,394 pounds of tobacco.

20. On January 29, 2010, Respondent collected an indemnity payment of $104,429.00, minus credits due to GAIC, for a total of $72,688.00.

21. During the course of a review of the administration of the crop insurance program, the Risk Management Agency discovered that Respondent had not reported the sale of 29,248 pounds of tobacco for $12,052.20 to Independent Tobacco Service in October and November 2009.

22. Respondent provided various explanations for not reporting the sales and for the source of the tobacco that was sold.

23. One of Respondent's assertions was that the tobacco he sold was carried over from 2006.

24. Respondent carried over some tobacco, but the amount is not verifiable.

25. Respondent failed to report carry over tobacco in 2006, 2007, 2008, or 2009.

26. There is no evidence that drought existed in 2009 that affected the tobacco crop on non-irrigated tobacco grown in Respondent's geographic area.

27. Respondent certified a production worksheet that reported false information of tobacco on Unit 104 in 2009.

28. Respondent was paid an indemnity based on a false claim of loss due to drought.

V. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.

2. Respondent's reporting of false production represents a material misrepresentation of fact under the Federal Crop Insurance program.

3. Respondent's failure to report carry-over tobacco was a violation of requirements of FCIC and of his insurance policy, Section 27, and voided his policy.

4. Respondent was paid an indemnity overpayment for losses that he did not incur.

5. Respondent willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act [Act]. 7 U.S.C. § 1515(h).

6. Respondent's violations of the Act warrant the imposition of the sanctions recommended by USDA.

ORDER

Pursuant to section 515(h)(3)(B) of the Act (7 U.S.C. § 1515(h)(3)(B)) and FCIC's regulations (7 C.F.R. part 400, subpart R), Respondent Steven Lane, individually and as partner to or principal of any other entity, is disqualified from receiving any monetary or

nonmonetary benefit provided under each of the following for a period of five years:

(a) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);

(b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);

(c) The Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.*);

(d) The Commodity Credit Corporation Charter Act (15 U.S.C. § 714 *et seq.*);

(e) The Agricultural Adjustment Act of 1938 (7 U.S.C. § 1281 *et seq.*);

(f) Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq.*);

(g) The Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 *et seq.*); and

(h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

Unless this Decision and Order is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence thirty-five (35) days after this decision is served. As a disqualified individual, the Respondent will be reported to the U.S. General Services Administration [GSA] pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System [EPLS].

A civil fine of $11,000.00 is imposed upon the Respondent pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. §1515(h)(3)(A) and (4)). This civil fine shall be paid by cashier's check or money order

or certified check, made payable to the order of the "Federal Crop Insurance Corporation" and sent to:

USDA, Risk Management Agency, Fiscal Operation Branch
Attn: Dena Prindle
Beacon Facility Mail Stop 0801
P.O. Box 419205
Kansas City, Missouri 64141-6205

Your payment should be annotated with "Account Name: Steve Lane-Civil Fine."

This Decision and Order shall be effective thirty-five (35) days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

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FOOD & NUTRITION ACT

DEPARTMENTAL DECISIONS

In re: DEPARTMENT OF PUBLIC HEALTH AND SOCIAL SERVICES, GUAM.[1]
Docket No. 15-0151.
Decision and Order.
Filed April 22, 2016.

FNA.

James W. Gillan, Esq. for Petitioner.
Michael Knipe, Esq. for Respondent.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER

I. PRELIMINARY STATEMENT

The instant matter involves a petition filed on July 28, 2015 by the Department of Public Health and Social Services of the territory of Guam [Petitioner] for review of sanctions imposed against Petitioner by the Food and Nutrition Service of the United States Department of Agriculture [FNS]. Jurisdiction for this proceeding is authorized by section 16(c)(7)-(8) of the Food and Nutrition Act of 2008 [FNA], 7 U.S.C. § 2025(c)(7)-(8). The matter involves a quality control review of Guam's supplemental nutrition assistance program for fiscal year [FY] 2014.

II. PROCEDURAL HISTORY

The geographical distance between Petitioner and Respondent created difficulties in the ability of the parties to meet timeframes established by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary [the Rules] (7 C.F.R. §§ 1.30 *et seq.*).

[1] The parties are advised that the proper caption for this matter appears herein. The terms "Appellant" and "Appellee" refer to appeals of initial decisions and orders by USDA Administrative Law Judges to the Judicial Officer for the Secretary of the United States Department of Agriculture.

Petitioner's appeal was filed with the Hearing Clerk for the Office of Administrative Law Judges [OALJ] on July 28, 2015. Because Petitioner had not filed submissions, as required by order issued October 15, 2015, I directed Petitioner to file pleadings pursuant to 7 C.F.R. § 283.25(e). I also directed Respondent FNS to file a response to the petition.

On October 16, 2015, counsel for FNS entered his appearance. On November 3, 2015, Petitioner moved for additional time to file its submissions, and on November 19, 2015, Respondent filed notice that it did not object to the motion. Before I could rule on the motion, Petitioner filed its submissions on November 23, 2015, which it supplemented with a brief filed on December 1, 2015. On February 1, 2016, Respondent moved for summary judgment.

On March 11, 2016, Petitioner filed a response to the Motion for Summary Judgment that did not explicitly raise genuine issues of material fact, but asked for reconsideration of the civil penalty. I shall address this issue in my discussion.

III. AUTHORITIES

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); FED. R. CIV. P. 56(c)).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler,* 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

The Food and Nutrition Act of 2008 [FNA] (7 U.S.C. §§ 2011 *et seq.*) applies to the adjudication of the instant proceeding, which involves Petitioner's administration of the Supplemental Nutrition Assistance Program [SNAP]. SNAP is a Federal aid program designed to "alleviate . . . hunger and malnutrition" among Americans by allowing "low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. § 2011. The program, which is administered by FNS, provides low-income and no-income households benefits that are to "be used only to purchase food from retail food stores which have been approved for participation in the supplemental nutrition assistance program." 7 U.S.C. § 2013(a); 7 C.F.R. § 271.3(a). The amount of benefits a recipient receives depends upon the household's size, income, and expenses. The Act authorizes the Secretary of Agriculture to pay each State (or territory) agency fifty percent (50%) of all administrative costs associated with the administration of the program, while the federal government funds one-hundred percent (100%) of the cost of the SNAP benefits. 7 U.S.C. § 2025(a).

In addition to providing the benefits, the FNA establishes a quality-control system for SNAP and has implemented regulations directing FNS to evaluate each "State [or territory] agency's payment accuracy based upon its error rates." 7 C.F.R. § 275.23(b). The review establishes a payment error rate that is based upon a two-year liability system that compares each State's (or territory's) performance to a national performance measure [NPM]. 7 U.S.C. § 2025(c)(6)(A).

The review process begins when FNS conducts an annual validation review of the territory's monthly collection of sample cases in which the territory identified payment errors. 7 C.F.R. § 275.2. After identifying cases in which FNS disagrees with the territory's conclusions about specific cases ("disagrees"), FNS shares the results of its review with the territory and gives it the opportunity to contest FNS' findings. 7 C.F.R. §§ 275.3(c), 275.14(b). States and territories may also request binding arbitration of a disputed FNS quality control validation review. 7 C.F.R. § 275.3(c)(4).

A territory is deemed to be in "liability status" the first full fiscal year [FFY] in which FNS determines that a ninety-five percent (95%) statistical probability exists that the State's payment error rate exceeds 105 percent (105%) of the NPM. When FNS assigns a territory liability status, the territory is put on notice that if its agency's performance error rate exceeds the NPM in the subsequent FFY, the territory will be assessed a monetary liability amount. A liability amount must be established when, for the second or subsequent FFY, FNS determines that there is a ninety-five percent (95%) statistical probability that the agency's payment error rate exceeded 105 percent (105%) of the NPM for payment error rates. 7 U.S.C. § 2025(c)(1)(D).

FNS is required to designate fifty percent (50%) of the liability to be newly invested in SNAP improvement activities by the territory and to designate fifty percent (50%) of the liability to be considered as "at-risk" for repayment. 7 U.S.C. § 2025(c)(1)(D).

The standard of review applicable to this appeal is set forth at sections 14(a)(8) and 16(c)(8) of the FNA (7 U.S.C. §§ 2023(a)(8) and 2025(c)(8)). Pursuant to the FNA, an administrative law judge is authorized to apply the factual allegations underlying the petition to

statutes and regulations applicable to SNAP. The FNA provides that "[a] State [or territory] agency aggrieved by a claim shall have the option of requesting a hearing to present its positon in addition to a review of the record and any written submission presented by the State agency." 7 C.F.R. § 276.7(a)(2). An administrative law judge may then determine that the grounds that the territory asserts for relief from the liability amount constitutes "good cause" for relieving the liability in full or in part. 7 U.S.C. § 2025(c)(7),(8); 7 C.F.R. § 275.23(f). Relevant to the instant action, a State [territory] is entitled to seek relief from liability of all claims on the basis that the State [territory] agency "had good cause for not achieving the payment error rate tolerance" where the agency has shown "otherwise effective administration" of SNAP. 7 C.F.R. § 275.23.

"Good cause" is defined in 7 C.F.R. § 275.23(f):

> (f) Good cause. When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, the State agency may seek relief from liability claims that would otherwise be levied under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ) in accordance with the procedures established under part 283 of this chapter. Paragraphs (f)(1) through (f)(5) of this section describe the unusual events that are considered to have a potential for disrupting program operations and increasing error rates to an extent that relief from a resulting liability amount is appropriate. The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate. Good cause relief will only be considered for that portion of the error rate/liability amount attributable to the unusual event . . .

7 C.F.R. § 275.23(f).

FNS regulations identify five "unusual events" that territory agencies "may use as a basis for requesting good cause relief": (1) natural disasters and civil disorders; (2) strikes; (3) caseload growth; (4) program changes; and (5) significant circumstances beyond the control of the State [or territory] agency. 7 C.F.R. §§ 275.23(f)(1)-(5). These five grounds, however, constitute exceptions to a State [territory] agency's "otherwise effective administration" of SNAP. 7 C.F.R. § 275(f).

> The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State [territory] agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate.

Id.

IV. DISCUSSION

In its response to Respondent's Motion for Summary Judgment, Petitioner did not object to the entry of summary judgment but asked Respondent to adjust the results of FNS' quality control review of Petitioner's error rate for FFY 2014 to eliminate errors that arose from "household error" rather than "agency error." Petitioner is seeking a reduction in the liability of $117,060.00 calculated by FNS.

I find that the material facts in this matter are not in dispute. In an undated memorandum to Guam's Attorney General, Petitioner acknowledged that the national average payment error for FFY 2014 was 3.66%. Respondent's FFY 2014 quality control validation review [QVCR] of Petitioner's monthly reviews identified 375 cases with which FNS disagreed. Petitioner challenged forty-three out of those 375 cases and requested informal resolution of only two cases. One of those cases was overturned upon review by FNS. *See* Declaration of Lynn Sims at Appendix III to Respondent's Motion. Petitioner did not request

arbitration to resolve the remaining challenged findings. *Id.* Rather, Petitioner submitted a corrective action plan based upon the payment errors reviewed by FNS in its FY 2014 QVCR. *See* Declaration of Shady Monemzadeh at Appendix VI to Respondent's Motion.

By letter dated June 26, 2015, FNS advised Petitioner that its combined overpayment and underpayment error rates resulted in a payment error rate of 7.08 percent (%). Email exchanges between Petitioner and Respondent establish that Petitioner lodged informal objections. In correspondence addressed to the Administrator of FNS dated July 17, 2015, Petitioner asserted that the error rate of 7.08 percent (%) was inconsistent with the "partnerweb"[2] error rate of 6.91 percent (%). Petitioner attributed sixty-five percent (65%) of errors to client errors and potential client fraud, and it contended that delay in the review of its reinvestment plan for FY 2011 and FY 2012 hampered its ability to implement improvement activities. Petitioner averred that it had not been given the opportunity to challenge the evidence on which FNS calculated its error rate.

Since the calculation of the error rate is based upon a statistical sample, I find no great difference between the 7.08% that FNS calculated and the 6.91 percent (%) that was reported on Petitioner's account on the agency's "partnerweb." Petitioner's claim that its high error rate was due to errors and fraud committed by its beneficiaries suggest that Petitioner was not administering FNS programs with proper oversight. The delay in receiving funding is not an unanticipated possibility when your funding source is the federal government and does not alleviate Petitioner from its responsibility to prevent errors. Finally, the evidence demonstrates that Petitioner had several opportunities to challenge FNS' FY 2014 quality control review findings and failed to exhaust them.

None of Petitioner's arguments constitute good cause as defined by the prevailing Regulations; therefore, I find no grounds to relieve Petitioner of its liability.

[2] "Partnerweb" is a website designed to assist the administration of FNS programs, which provides participants with access to information compiled by the agency as well as updates on rules and directives.

V. FINDINGS OF FACT

1. Petitioner, the Department of Public Health and Social Services for the Territory of Guam, administers Petitioner's Supplemental Nutrition Assistance Program [SNAP].

2. For FFY 2014, Petitioner's SNAP payment error rate exceeded the NPM for SNAP payment rates for that FFY, which Petitioner admitted was 3.66 percent (3.66%).

3. For FFY 2014, Petitioner's SNAP payment error rate was 7.08 percent (7.08 %).

4. For FFY 2014, a ninety-five percent (95%) statistical probability existed that Petitioner's payment error rate exceeded 105 percent (105%) of the NPM for SNAP payment error rates.

5. As a result of Petitioner's error rates in FFY 2014, Respondent established a liability amount of $117.060.00 for Petitioner for FFY 2014.

VI. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Summary judgment is appropriate in this matter as no genuine issue of material fact exists.

3. Petitioner is not entitled to good-cause relief for its SNAP payment error rate for FFY 2014.

ORDER

The Petition for Appeal by Petitioner Department of Public Health and Social Services of Guam, a territory of the United States of America is DENIED.

Petitioner is assessed a monetary liability of $117,060.000 for FFY 2014, which shall be allocated in accordance with statutes, regulations, and other rules that apply to the SNAP.

This Decision and Order shall become final and effective thirty (30) days after the date of service thereof unless a petition for review is filed with the Judicial Officer pursuant to 7 C.F.R. § 283.20.

The Hearing Clerk shall send copies of this Order by certified and regular mail.

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HORSE PROTECTION ACT

COURT DECISIONS

McSWAIN v. VILSACK.
No. 1:16-CV-01234-RWS.
Court Order.
Filed May 25, 2016.

HPA – Disqualification – Due process – Fifth Amendment – Hearing, opportunity for – Post-deprivation action – Property rights – Scar Rule – Soring – Tennessee Walking Horses.

[Cite as: No. 1:16-CV-01234 (RWS), 2016 WL 4150036 (N.D. Ga. May 25, 2016)].

The Court granted Plaintiffs' Motion for Preliminary Injunction, enjoining Defendants from disqualifying Plaintiffs' horse under the Scar Rule with adequate pre-deprivation process. The Court held that Plaintiffs met their burden to establish a substantial likelihood of success on the merits of their Fifth Amendment claim that Defendants violated due process requirements by enforcing the Horse Protection Act. In so holding, the Court found that: (1) Plaintiffs had a property interest in their horse and a reasonable interest in showing their horse without government interference; (2) Plaintiffs were not given proper pre-deprivation or post-deprivation notice; (3) pre-disqualification process under the HPA—inspection by a Veterinary Medical Officer or Designated Qualified Person—would not adequately protect Plaintiffs' property interests; (4) because a post-deprivation action must be initiated by the USDA and is guaranteed only if USDA seeks to impose a criminal or civil penalty, Plaintiffs were denied the opportunity for post-deprivation process; and (5) disqualification under the Horse Protection Act constitutes an irreparable injury for which Plaintiffs was entitled to relief. Ultimately, the Court ruled that USDA's enforcement scheme of the Horse Protection Act violated Plaintiff's due process rights.

United States District Court,
Northern District of Georgia, Atlanta Division.

ORDER

RICHARD W. STORY, UNITED STATES DISTRICT JUDGE, DELIVERED THE ORDER OF THE COURT.

This case comes before the Court on Plaintiffs' Motion for Preliminary Injunction. After a review of the record, and with the benefit of oral argument, the Court enters the following Order.

I. BACKGROUND

This case arises out of the United States Department of Agriculture's (the "USDA") enforcement of the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* (the "HPA"). Plaintiffs Keith McSwain and Dan McSwain (collectively, the "McSwains") own and train Tennessee Walking Horses. These horses are known and prized for their "high-step gait," which can be created through breeding and training. (Am. Compl., Dkt. [5] ¶ 2.) In the 1950s and 1960s, however, some trainers developed a practice of injuring or "soring" their horses to artificially produce the desired gait. (*Id.*) According to the USDA's Animal and Plant Health Inspection Service ("APHIS"), "soring" is the practice of "injuring [ ] show horses to improve their performance in the show ring. The pain caused by soring accentuates the gait of show horses." 43 Fed. Reg. 14778, 14778 (Apr. 26, 1988). In 1970, Congress responded to the practice of soring by enacting the HPA. (*Id.* ¶ 4.) The HPA prohibits not only soring horses, but also the showing, sale, and transportation of sored horses. (*Id.*)

In 1979, the Secretary of the USDA promulgated a regulation commonly referred to as the "Scar Rule." (*Id.* ¶ 5.) A horse is "sore" under the Scar Rule if it shows signs of previous soring. (*Id.*) As such, a horse may be disqualified from a competition even when it is not presently exhibiting signs of pain. (*Id.*) Soring often produces "tell-tale signs of scar tissue on [the horse's] pasterns, the ankle area above the hoof." (I*d.* ¶ 9.) The Scar Rule sets forth criteria for an examiner to determine whether any scar tissue on the horse is a result of impermissible soring rather than the result of "normal wear and tear – much like a worker's hands become calloused." (*Id.*)

The USDA has delegated enforcement of the HPA to APHIS, the USDA's component entity. (*Id.* ¶ 21.) For enforcement purposes, APHIS employs its own Veterinary Medical Officers ("VMOs") and also delegates its authority to private inspectors known as Designated Qualified Persons ("DQPs"). (*Id.* ¶¶ 27-28.) DQPs are licensed by private Horse Industry Organizations ("HIOs"). (*Id.* ¶ 28.) USDA regulations provide that HIOs are certified by the USDA to train and license DQPs. (*Id.* ¶ 29.) VMOs also train DQPs. (*Id.*) Both VMOs and DQPs examine horses at competition in pre– and post-show inspections.

(*Id.* ¶ 7.) DQPs are the primary inspectors and therefore the primary enforcement mechanism for the HPA. (*Id.* ¶ 30.) Defendants–through their VMOs–"selectively" appear at competitions to oversee DQP enforcement and to inspect horses. (*Id.* ¶ 31.) Plaintiffs allege that Defendants only attend "select" competitions, at which their enforcement conduct varies. (*Id.* ¶ 50.) Plaintiffs suggest that Defendants tend to attend high-profile competitions, such as the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while relying on DQPs for enforcement at smaller events. (*Id.*)

DQPs are private veterinarians who do not have a contractual relationship with the USDA. (*Id.* ¶ 44.) Most inspections at horse shows are done by DQPs. At many competitions, both VMOs and DQPs will be present to inspect horses for HPA compliance. (*Id.* ¶ 47.) Plaintiffs allege that it is common practice for a DQP to determine that a horse complies with the HPA only to have the USDA's VMOs disqualify the same horse for purported Scar Rule Violations. (*Id.* ¶ 48.) This has been the pattern each time Honors has been disqualified for a Scar Rule violation. (*Id.*) On at least three occasions, Honors has been disqualified by Dr. Jeff Baker, APHIS's lead VMO. (*Id.* ¶ 46.)

VMOs and DQPs inspect horses pursuant to the USDA's regulations. (*Id.* ¶¶ 56-57.) Inspectors look for *current* soreness by "palpating" the horse, physically examining the horse's front legs and hooves. 9 C.F.R. § 11.21. Inspectors use different tests and criteria to determine whether the horse has *ever* been sored. (*Id.* ¶ 59.) The Scar Rule, found at 9 C.F.R. § 11.3, provides distinct criteria for violations in the horse's posterior regions versus the anterior regions. (*Id.* ¶ 61.) The anterior and anterior-lateral surfaces of the horse's fore pasterns–the part of the leg between the fetlock and the top of the hoof–must be free of bilateral granulomas, evidence of inflammation, and other evidence of abuse. 9 C.F.R. § 11.3. In contrast, the posterior surfaces of the pastern *may* show bilateral areas of uniformly thickened epithelial tissue, if those areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation. *Id.* Plaintiffs allege that Defendants "mix and match" the different criteria in order to find soring and therefore a violation of the Scar Rule. (Am. Compl., Dkt. [5] ¶ 64.) Plaintiffs claim that this conduct violates the Administrative Procedure Act. (*Id.* ¶ 65.)

The HPA provides that management at Tennessee Walking Horse shows or exhibitions "shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if management has been notified by a person appointed in accordance with [the] regulations ... or by the Secretary that the horse is sore." 15 U.S.C. § 1823(a). The USDA may seek administrative review of a disqualification. (Am. Compl., Dkt. [5] ¶ 38.) This is for the purpose of seeking a penalty, either civil or criminal, beyond disqualification after a finding of soring. (*Id.*) *See also* 15 U.S.C. § 1825 (outlining civil and criminal penalties). There is, however, no administrative procedure in place for a horse owner to initiate a hearing to contest a disqualification after a horse is disqualified for a violation of the Scar Rule. (Am. Compl., Dkt. [5] ¶ 39.)

Plaintiffs own several Tennessee Walking Horses, but Plaintiffs' Complaint and Motion for Preliminary Injunction focus primarily on Plaintiffs' prize horse, Honors. Honors is "one of the most famous Tennessee Walking Horses in the world," and has been called the "Secretariat of Tennessee Walking Horses." (*Id.* ¶ 33.) Plaintiffs state that they have never sored Honors and that all of Honors' success is a result of breeding and training. (*Id.* ¶¶ 34-35.) In recent years, however, Honors has been disqualified for violations of the Scar Rule on at least four occasions: at the 2013, 2014, and 2015 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and at the 2014 Red Carpet Horse Show of the South in Pulaski, Tennessee. (*Id.* ¶ 36.)

Plaintiffs allege that Defendants apply an informal "once-scarred-always-scarred" rule. (*Id.* ¶ 71.) Under this "rule," Defendants use a prior disqualification of a horse pursuant to the Scar Rule as a basis to disqualify the horse in subsequent competitions. (*Id.*) Plaintiffs claim that Defendants have used this unwritten rule to disqualify Honors on multiple occasions. (*Id.*) Defendants deny that they apply this rule.

As a result of the informal "once-scarred-always-scarred" rule, Plaintiffs allege that one Scar Rule disqualification can operate to effectively end a horse's career without any due process. (*Id.* ¶ 72.) Plaintiffs claim that this result can be much harsher than the penalties provided in the statute-but that unlike the penalties in 15 U.S.C. § 1825, which require notice and an opportunity for a hearing, disqualification pursuant to the Scar Rule is not subject to challenge or review. (*Id.* ¶¶ 74-

75.) Plaintiffs assert that Defendants' practice accordingly violates the Fifth Amendment. Additionally, Plaintiffs contend that Defendants are applying criteria not included in the Scar Rule, and therefore improperly altering their interpretation and application of the Rule. (*Id.* ¶ 10.) Plaintiffs argue that Defendants are acting without legislative approval to disqualify horses with lawful scars. (*Id.*) This contention serves as the basis for Plaintiffs' Administrative Procedure Act claim.

The focus of this Order is Plaintiffs' claim under the Fifth Amendment. Plaintiffs challenge Defendants' application of the Scar Rule on constitutional grounds, because Defendants do not provide a method for Plaintiffs to challenge any disqualifications under the Scar Rule. In Count I of the Amended Complaint, Plaintiffs seek a declaration that Defendants' enforcement of the HPA, and particularly the Scar Rule, violates Plaintiffs' Fifth Amendment right to due process. (*Id.* ¶ 143.)

Plaintiff alleges that Defendants' failure to provide a pre-deprivation hearing is "particularly troubling in light of the subjective nature of VMO inspections.... The risk of an erroneous disqualification is high, as are the risks of arbitrary and capricious findings by VMOs and DQPs." (*Id.* ¶ 149.) Moreover, neither the HPA nor Defendants' regulations provide a procedure for a horse owner to initiate a post-deprivation challenge to a horse's disqualification. (*Id.* ¶ 150.) Instead, judicial review only occurs when Defendants bring an administrative complaint, the administrative law judge enters judgment, and the horse's owner appeals the judgment to a court of law. (*Id.* ¶ 151.) Plaintiffs argue that Defendants' failure to provide any pre– or post-deprivation hearing is a constitutional deprivation.

Plaintiffs move for preliminary injunctive relief in advance of nine upcoming Tennessee Walking Horse competitions, beginning with the Fun Show held from May 26 to 28, 2016, in Shelbyvill, Tennessee. (Am. Compl., Dkt. [5] ¶ 202; Pls.' Mot. for Prelim. Inj., Dkt. [9].)

II. DISCUSSION

The Court agrees that the current enforcement scheme violates Plaintiffs' due process rights. The Court will first lay out the relevant legal standard for a motion for a preliminary injunction. Then, the Court

will discuss the constitutionally protected rights in this case before turning to an analysis of how Defendants' procedures deprive Plaintiffs of those rights without due process. Finally, the Court considers a remedy.

A. Legal Standard – Preliminary Injunction

Before a court will grant preliminary injunctive relief, the moving party must establish that: (1) "it has substantial likelihood of success on the merits," (2) it will suffer irreparable injury if the relief is not granted, (3) the threatened injury outweighs the harm the relief may inflict on the non-moving party, and (4) entry of relief "would not be adverse to the public interest." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). "Of these four requisites, the first factor, establishing a substantial likelihood of success on the merits, is most important ...." *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1294 (S.D. Fla. 2008). For a permanent injunction, the standard is essentially the same, except that the movant must establish actual success on the merits, as opposed to a likelihood of success. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n. 12 (1987).

III. ANALYSIS

Here, the Court holds that Plaintiffs have demonstrated a substantial likelihood of success on the merits of their constitutional claim. The Court does not hold that Plaintiffs have similarly met this high burden with respect to their claim under the Administrative Procedure Act. Accordingly, this Order focuses only on Plaintiffs' claim under the Fifth Amendment.

The due process clause of the Fifth Amendment protects individuals against deprivations of liberty or property by the federal government without due process of law. U.S. Const. amend. V. In order to establish a due process violation, plaintiffs must show (1) they have a protected property interest; and (2) they were deprived of that interest by governmental action and without due process of law. *Callaway v. Block*, 763 F.2d 1283, 1290 (11th Cir. 1985).

A. Property Right

Plaintiffs characterize the constitutional right at issue as their property interest in Honors, including the "right to show Honors and reap the financial gains." (Pls.' Mot. for Prelim. Inj., Dkt. [9-1] at 12 n.4.) The Court agrees that Plaintiffs have a constitutionally protected right here.

To have a fifth amendment property interest in a benefit, "a person ... must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court has recognized the constitutional right to practice a chosen profession. *See Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"). The Sixth Circuit Court of Appeals has applied that holding in a due process case challenging the Horse Protection Act. *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983). *See also Barry v. Barchi*, 443 U.S. 55, 59 (1979) (finding a constitutionally protected interest in a harness race horse trainer's license).

Additionally, an animal owner has rights in his or her animals. *Siebert v. Severino,* 256 F.3d 648, 660 (7th Cir. 2001). This is "especially the case with potential income-generating animals such as horses." *Reams v. Irvin*, 561 F.3d 1258, 1264 (11th Cir. 2009) (quoting *Porter v. DiBlasio*, 93 F.3d 301, 306-07 (7th Cir. 1996)). Here, aside from the general interests Plaintiffs have in their animal and in their chosen profession, Plaintiffs have represented to the Court that Honors is an exemplary Tennessee Walking Horse. Honors has the potential to generate substantial income for the McSwains. It is for this purpose that the McSwains have chosen to breed and train Honors.

The Court finds that Plaintiffs have a constitutionally protected interest in showing Honors without unreasonable government interference. Defendants argue that Plaintiffs do not have a constitutionally protected interest in showing a sored horse. But that argument misses the thrust of this case. Plaintiffs' position is that Honors is not and has never been sored. The problem here is that Plaintifs [sic] do not have a way to challenge the USDA's finding that Honors has been

sored. The Court does not find an unchecked constitutional right to show horses. Rather, the Court holds that these Plaintiffs have a right to show an unsored horse without unreasonable government interference. "Indeed, the hallmark of a protected property interest is 'an individual entitlement grounded in ... law, which cannot be removed except 'for cause.' ' " *Callaway v. Block*, 763 F.2d 1283, 1290 (11th Cir. 1985) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)). If Plaintiffs–or any other Tennessee Walking Horse owners and trainers–have in fact sored their horses, then their entitlement to show those horses may be removed "for cause." But the "for cause" question is another, later step of the analysis. The Court and Defendants must start from the premise that Plaintiffs and other horse owners have a constitutionally protected right in showing their horses. Next, the Court considers whether Plaintiffs were deprived of that interest by governmental action and without due process of law.

B. Due Process

Because Plaintiffs were denied their property interest in showing Honors at the 2013, 2014, and 2015 Tennessee Walking Horse National Celebrations and at the 2014 Red Carpet Horse Show of the South, the Court must now consider the constitutionally required process corresponding to those deprivations. A government deprivation of property must normally be preceded by adequate process. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). However, post-deprivation process may be sufficient where there exists a "necessity of quick action by the State or the impracticability of providing any predeprivation process." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

As Defendants currently enforce the HPA, the Court holds that Plaintiffs have not been provided with adequate process either pre– or post-deprivation. Here, the deprivation is Honors' disqualification. Pre-disqualification, the process afforded to Plaintiffs is an inspection by a VMO, a DPQ, or both. Plaintiffs contend, and Defendants concede, that this inspection is the only pre-disqualification process afforded to Plaintiffs under the current scheme. Defendants point to 9 C.F.R. § 11.4(h), which provides for reexamination by a VMO within 24-hours of finding an HPA violation. But here, Plaintiffs complain specifically about instances in which Honors was first inspected and passed by DPQs

before being re-inspected and disqualified by VMOs. (*See* Pl.'s Mot. for Prelim. Inj. Br., Dkt. [9-1] at 17.) Accordingly, based on the record before the Court, this regulation does not adequately protect Plaintiffs' property interests. Importantly, Plaintiff do not have the opportunity to appeal or otherwise be heard prior to their horse's disqualification.

In addition, any post-deprivation action must be initiated by the USDA. It is *only* if the USDA seeks to impose a criminal or civil penalty that the owner or trainer is guaranteed notice and an opportunity to be heard. 15. U.S.C. § 1825. This provision is not mandatory-it authorizes rather than requires the USDA to pursue civil or criminal sanctions. As such, there is no guarantee of post-deprivation process. In this case, Honors has been disqualified on four occasions and the USDA has never sought any additional penalties. Accordingly, Plaintiffs have not had the opportunity for post-deprivation process.

In conclusion, Plaintiffs have demonstrated a substantial likelihood of success on their Fifth Amendment claim. The disqualification of Honors marks the point of deprivation and Plaintiffs have no guarantee of either pre– or post-deprivation process. Additionally, the record shows that disqualification is an irreparable injury. The Tennessee Walking Horse shows are unique and finite opportunities for Honors to compete and as such Plaintiffs suffer an irreparable harm if Honors is erroneously disqualified. Moreover, the potential injury to Plaintiffs is significant and the relief requested–the opportunity to prove that Honors is not sore–inflicts little harm on Defendants. Finally, while the Court recognizes the important public interest and Congressional intent of preventing the soring of horses, any entry of relief here will be limited to the parties to this case and therefore will not be adverse to the public interest. Plaintiffs are therefore entitled to preliminary injunctive relief.

IV. RELIEF

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Reams v. Irvin*, 561 F.3d 1258, 1263 (11th Cir. 2009) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). This requirement, however, does not necessarily dictate that the government provide a hearing prior to the initial deprivation of property. *Id.* (citing *Parratt v. Taylor*, 451 U.S. 527,

540-41 (1981)) (noting that the court's rejection of such a rule "is based in part on the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available"), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986)).

"[D]ue process is a flexible concept that varies with the particular circumstances of each case," and as such this Court must apply the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether pre-deprivation process is required in this case. *Grayden v. Rhodes*, 345 F.3d 1225, 1232-33 (11th Cir. 2003). This Court must consider four factors:

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Reams, 561 F.3d at 1263-64 (quoting *Mathews*, 424 U.S. at 335).

Here, the Court finds that the factors weigh in favor of requiring pre-deprivation process. The nature of the interest–Plaintiffs' ability to show Honors-is such that post-deprivation process cannot serve to fully make Plaintiffs whole. As the HPA is currently enforced, the disqualification is essentially final, complete, and irreversible. On the record before the Court, Plaintiffs have established a substantial likelihood that a pre-show disqualification that prevents Honors from competing is a "uniquely final deprivation." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 20 (1978). Additionally, Plaintiffs proffered evidence that the subjective inspection methods currently employed by Defendants are subject to a high rate of error. Plaintiffs proffered evidence that additional methods, such as biopsies of the suspected scar tissue, have a much higher accuracy rate. Accordingly, the probable value of additional safeguards is quite high. The first two *Mathews* factors weigh heavily in favor of pre-deprivation process.

The Court recognizes, however, the practical difficulties Defendants would face in providing the owner of each disqualified horse a hearing prior to a show. But Plaintiffs and Defendants have agreed that any relief imposed by the Court should apply only to the parties to this case. As such, the final *Mathews* factor is not sufficiently strong to outweigh the factors that tip the scale in favor of pre-deprivation relief. Additionally, while Defendants (and the public) certainly have an interest in preventing sore horses from competing, this interest must be protected without depriving Plaintiffs the process that they are due under the Constitution of the United States.

While Plaintiffs allege that they are being targeted by Defendants, the Court notes that it is not certain that Honors will be inspected and disqualified by Defendants at each of the Tennessee Walking Horse competitions identified in the Complaint. But the Court holds that if Defendants inspect Honors pre-show and find that he should be disqualified, Defendants must provide Plaintiffs notice and opportunity to be heard prior to any disqualification. The Court is sensitive to the burden this places on Defendants at the time of the event. Of course, since the HPA and enacting regulations allow for post-show as well as pre-show inspections, Defendants may elect to inspect Honors post-show. This would alleviate some of the logistical burden on Defendants to provide Plaintiffs the opportunity to prove that the horse is not scarred prior to the permanent deprivation that is a disqualification. Regardless of the timing of any inspection, the constitutional burden is on the government to provide Plaintiffs with the process that they are due. The Court does not wish to tread further into the USDA's affairs than necessary, and so will leave the form of any hearing to Defendants' discretion.

The Court notes Defendants' objection, raised at the May 10 hearing, that the HPA requires show management to disqualify a horse that is found to be in violation of the Scar Rule and that Plaintiffs therefore cannot seek relief because the management of the individual shows are not parties to this action. But it is not the conduct of the DPQs, who are employed by show management, that is the basis of Plaintiffs' Complaint. Rather, Plaintiffs allege that the VMOs, who are representatives of the USDA, are unfairly targeting and inaccurately

disqualifying Honors. It is the conduct of the VMOs that the Court enjoins here. As stated above, the relief here is limited to the parties to this action.

V. CONCLUSION

In accordance with the foregoing, the Court **DECLARES** that Plaintiffs have met their burden to show a substantial likelihood of success on the merits of their claim that Defendants' enforcement of the HPA violates the Due Process clause of the Fifth Amendment. The Court **GRANTS** Plaintiffs' Motion for Preliminary Injunction [9]. Defendants are hereby **ENJOINED** from disqualifying Plaintiffs' horse, Honors, under the Scar Rule without providing Plaintiffs with adequate pre-deprivation process, including notice and the opportunity to be heard.

SO ORDERED, this 25th day of May, 2016.

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: TERRY WAYNE SIMS.
Docket No. 15-0150.
Decision and Order.
Filed April 29, 2016.

HPA – Administrative procedure – Answer, failure to file timely – Appeal petition, requirements of – Civil penalty – Disqualification – Sanction policy – Soring.

Darlene M. Bolinger, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

I. PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on July 20, 2015. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges, on August 24, 2012, Terry Wayne Sims violated 15 U.S.C. § 1824(2)(B) by entering, for the purpose of showing or exhibiting, a horse known as "The Spooky Spook" as entry number 526, in class number 53, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while The Spooky Spook was sore.[1]

On July 29, 2015, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by

[1] Compl. ¶ II 3, at first and second unnumbered pages.

certified mail, served Mr. Sims with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated July 20, 2015.[2] Mr. Sims failed to file an answer within twenty days after the Hearing Clerk served Mr. Sims with the Complaint, as required by 7 C.F.R. § 1.136(a).

On October 21, 2015, Administrative Law Judge Janice K. Bullard [ALJ] filed an Order to Show Cause Why Default Should Not Be Entered [Order to Show Cause] in which the ALJ provided Mr. Sims and the Administrator twenty days within which to show cause why a default order should not be entered in favor of the Administrator due to Mr. Sims's failure to file an answer. The Administrator requested additional time within which to respond to the Order to Show Cause,[3] which request the ALJ granted.[4] On November 16, 2015, in response to the ALJ's Order to Show Cause, the Administrator filed a Motion for Adoption of Proposed Decision and Order and Response to Order to Show Cause Why Default Judgment Should Not Be Entered Against the Respondent [Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [Proposed Default Decision]. On December 17, 2015, Mr. Sims filed a response to the Administrator's Motion for Default Decision and Proposed Default Decision.

On January 14, 2016, in accordance with 7 C.F.R. § 1.139, the ALJ filed a Decision Without Hearing by Reason of Admissions [Default Decision]: (1) concluding Mr. Sims violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Sims a $2,200 civil penalty; and (3) disqualifying Mr. Sims for five years from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[5]

On February 3, 2016, Mr. Sims appealed the ALJ's Default Decision to the Judicial Officer, and, on April 14, 2016, the Administrator filed Response to Document Filed on February 3, 2016. On April 27, 2016,

[2] United States Postal Service Domestic Return Receipt for article number XXXX2777.
[3] Administrator's Mot. for Extension of Time, filed October 29, 2015.
[4] ALJ's Order Granting Mot. for Extension of Time, filed November 5, 2015.
[5] ALJ's Default Decision at 4-5.

the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Default Decision.

II. DECISION

Statement of the Case

Mr. Sims failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Sims is an individual who lives in Kentucky.

2. Mr. Sims failed to file an answer to the Complaint.

3. On August 24, 2012, Mr. Sims entered a horse known as "The Spooky Spook" as entry number 526, in class number 53, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

4. On August 24, 2012, the horse known as "The Spooky Spook," entered by Mr. Sims at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, was inspected and found to be sore.

5. On July 29, 2009, Mr. Sims signed *Lunsford*, HPA Docket No. 08-0111, 2009 WL 2762668 (U.S.D.A. Aug. 6, 2009) (Consent Decision as to Sims), to resolve allegations that he violated the Horse Protection Act.

6. Chief Administrative Law Judge Peter M. Davenport issued *Sims*, HPA Docket No. 12-0192, 2012 WL 3877366 (U.S.D.A. July 20, 2012)

(Default Decision), in which Chief Administrative Law Judge Peter M. Davenport concluded Mr. Sims violated the Horse Protection Act.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Mr. Sims violated 15 U.S.C. § 1824(2)(B) by entering, for the purpose of showing or exhibiting, a horse known as "The Spooky Spook" as entry number 526, in class number 53, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while The Spooky Spook was sore.

3. The Order in this Decision and Order is authorized by the Horse Protection Act and justified under the circumstances described in this Decision and Order.

III. MR. SIMS'S APPEAL PETITION

On February 3, 2016, Mr. Sims filed a letter in which he contends the five-year disqualification period imposed against him by the ALJ is excessive and payment of the $2,200 civil penalty assessed by the ALJ would cause him and his family extreme hardship. The Administrator argues that Mr. Sims's February 3, 2016 filing does not comply with the requirements for an appeal petition in the Rules of Practice and requests that I remove the filing from the record (Administrator's Resp. to Document Filed on Feb. 3, 2016, at 2).

The Rules of Practice set forth requirements for an appeal petition, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any

> deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a). The Judicial Officer has consistently dismissed purported appeal petitions that do not remotely conform to the requirements of 7 C.F.R. § 1.145(a).[6] However, I am reluctant to dismiss a filing in which a party fails to comply with all of the requirements of 7 C.F.R. § 1.145(a) but, nonetheless, clearly identifies those parts of an administrative law judge's decision with which that party disagrees. Mr. Sims's February 3, 2016, filing identifies those parts of the ALJ's Default Decision with which Mr. Sims disagrees. Therefore, while Mr. Sims's February 3, 2016, filing does not comply in all respects with the requirements in 7 C.F.R. § 1.145(a) for an appeal petition, I find the filing sufficient to constitute Mr. Sims's appeal of the sanctions imposed by the ALJ, and I reject the Administrator's request that I remove Mr. Sims's February 3, 2016, filing from the record.

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824. Pursuant to the Federal Civil Penalties Inflation

[6] Tierney, No. 13-0196, 2014 WL 7534276 (U.S.D.A. Dec. 9, 2014) (Order Dismissing Purported Appeal Pet.); Estes, No. 11-0027, 2014 WL 4311065 (U.S.D.A. June 12, 2014) (Order Dismissing Purported Appeal Pet. and Cross-Appeal); Kasmiersky, No. 12-0600, 2014 WL 4311063 (U.S.D.A. June 9, 2014) (Order Dismissing Purported Appeal Pet.); Oasis Corp., No. D-12-0423, 2013 WL 8208340 (U.S.D.A. Jan. 25, 2013) (Order Dismissing Purported Appeal Pet.); Gentry, No. D-07-0152, 2009 WL 9534126 (U.S.D.A. Mar. 18, 2009) (Order Dismissing Purported Appeal Pet.); Breed, 50 Agric. Dec. 675 (U.S.D.A. 1991) (Order Dismissing Purported Appeal); Lall, 49 Agric. Dec. 895 (U.S.D.A. 1990) (Order Dismissing Purported Appeal).

Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200.[7] The Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, when determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. Feb. 8, 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Mr. Sims contends payment of a $2,200 civil penalty would cause him and his family extreme hardship; however, extreme hardship is not one of the statutory factors that the Secretary of Agriculture must take into account when determining the amount of the civil penalty. Even if I were to construe Mr. Sims's claim of extreme hardship as an assertion that he is not able to pay a $2,200 civil penalty, I would not reduce the civil penalty assessed by the ALJ. While the Horse Protection Act requires that I take into account a respondent's ability to pay a civil penalty, the burden is on the respondent to come forward with some

[7] 7 C.F.R. § 3.91(b)(2)(viii).

evidence indicating an inability to pay the civil penalty.[8] Mr. Sims has not introduced any evidence indicating his inability to pay a $2,200 civil penalty, and, in the absence of evidence to the contrary, I deem Mr. Sims capable of paying the $2,200 civil penalty.

In most Horse Protection Act cases, the maximum civil penalty per violation is warranted.[9] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed, I do not find a maximum civil penalty in this case to be inappropriate. The Administrator, an administrative official charged with responsibility for achieving the congressional purpose of the Horse Protection Act, requests a maximum civil penalty.[10] Therefore, I affirm the ALJ's assessment of a $2,200 civil penalty against Mr. Sims.

The Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than one year for the first violation of the Horse Protection Act and for a period of not less than five years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in

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[8] Jenne,. 13-0080, 2015 WL 4538827, at *8 (U.S.D.A. July 17, 2015); Jenne, No. 13-0308, 2015 WL 1776433, at *6 (U.S.D.A. Apr. 13, 2015); Stepp, 57 Agric. Dec. 297, 318 (U.S.D.A. 1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (U.S.D.A. Aug. 13, 1999); Oppenheimer, 54 Agric. Dec. 221, 321 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer); Armstrong, Agric. Dec. 1301, 1324 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Burks, 53 Agric. Dec. 322, 346 (U.S.D.A. 1994); Holt, 49 Agric. Dec. 853, 865-66 (U.S.D.A. 1990).

[9] Jenne, No. 13-0080, 2015 WL 4538827, at *8 (U.S.D.A. July 17, 2015); Jenne, No. 13-0308, 2015 WL 1776433, at *6 (U.S.D.A. Apr. 13, 2015); Back, 69 Agric. Dec. 448, 463 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1504 (U.S.D.A. 2005) (Decision and Order as to Christopher Jerome Zahnd), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1475 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 208 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

[10] Administrator's Mot. for Default Decision at 3.

1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish the purpose of the Horse Protection Act is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[11]

The Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the Administrator has recommended the imposition of a five-year disqualification period, in addition to the assessment of a civil penalty,[12] and I have held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[13]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

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[11] *See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

[12] Administrator's Mot. for Default Decision at 3.

[13] Back, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. Dec. 28, 2005) (Decision as to Christopher Jerome Zahnd), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1476 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 492 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 209 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Mr. Sims's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted. As Mr. Sims has previously been found to have violated the Horse Protection Act,[14] I affirm the ALJ's imposition of the minimum five-year period of disqualification on Mr. Sims.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Sims is assessed a $2,200 civil penalty. Mr. Sims shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Sims's civil penalty payment shall be forwarded to, and received by, USDA APHIS GENERAL within 60 days after service of this Order on Mr. Sims. Mr. Sims shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 15-0150.

2. Mr. Sims is disqualified for five uninterrupted years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse

[14] *See Sims*, No. 12-0192, 2012 WL 3877366 (U.S.D.A. July 20, 2012) (Default Decision), in which Chief Administrative Law Judge Peter M. Davenport concluded Mr. Sims violated 15 U.S.C. § 1824(1)-(2)(B) and (2)(D) on August 29 and 30, 2009.

exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. The disqualification shall continue after the end of the five-year disqualification period until the $2,200 civil penalty assessed against Mr. Sims is paid in full. The disqualification of Mr. Sims shall become effective on the 60th day after service of this Order on Mr. Sims.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Sims has the right to seek judicial review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. Sims resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Sims must file a notice of appeal in such court within thirty days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[1] The date of this Order is April 29, 2016.

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In re: ROCKY ROY McCOY.
Docket No. 16-0026.
Decision and Order.
Filed June 2, 2016.

HPA – Administrative procedure – Default decision – Objections, timely filing of – Prejudice, lack of.

Burn W. Kidd, Esq. for Complainant.
David F. Broderick, Esq. and R. Taylor Broderick, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

[1] 15 U.S.C. § 1825(b)(2), (c).

HORSE PROTECTION ACT

I. PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 11, 2015. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges, on March 14, 2014, Rocky Roy McCoy violated 15 U.S.C. § 1824(2)(B) and (7) by entering, for the purpose of showing or exhibiting, a horse known as "Puttin It On the Line" as entry number 507, in class number 25, at the 46th Annual National Walking Horse Trainers' Show in Shelbyville, Tennessee, while Puttin It On the Line was sore and bearing a prohibited substance.[1]

On February 12, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. McCoy with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated December 11, 2015.[2] Mr. McCoy failed to file an answer within twenty days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On March 10, 2016, the Administrator filed a Motion for Adoption of Proposed Decision and Order [Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [Proposed Default Decision]. The Hearing Clerk served Mr. McCoy with the Administrator's Motion for Default Decision and Proposed Default Decision on March 16, 2016.[3] On March 22, 2016, David F. Broderick and R. Taylor Broderick entered their appearance as counsel for Mr. McCoy,[4] Mr. McCoy filed Respondent's Answer to Complaint [Answer] in which he denied the material allegations of the

[1] Compl. ¶ II at 1.
[2] United States Postal Service Domestic Return Receipt for article number XXXX 7732.
[3] United States Postal Service Domestic Return Receipt for article number XXXX 7886.
[4] Entry of Appearance.

Complaint,[5] and Mr. McCoy filed an objection to the Administrator's Motion for Default Decision.[6] On April 5, 2016, the Administrator filed a response to Mr. McCoy's March 22, 2016, objection to the Administrator's Motion for Default Decision.[7] On April 6, 2016, Mr. McCoy filed a Memorandum of Law in Support of Respondent's Response and Objection to Motion for Adoption of Proposed Decision and Order [Memorandum of Law].

On April 21, 2016, in accordance with 7 C.F.R. § 1.139, Administrative Law Judge Jill S. Clifton [ALJ] filed a Ruling Denying Default Judgment in which the ALJ found Mr. McCoy's objections to the Administrator's Proposed Default Decision meritorious and denied the Administrator's Motion for Default Decision.[8]

On April 28, 2016, the Administrator appealed the ALJ's Ruling Denying Default Judgment to the Judicial Officer,[9] and, on May 19, 2016, Mr. McCoy filed a response to the Administrator's Appeal Petition.[10] On May 20, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I reverse the ALJ's Ruling Denying Default Judgment and issue this Decision and Order based upon Mr. McCoy's failure to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a).

II. DECISION

[5] On March 25, 2016, Mr. McCoy filed Respondent's Amended Answer to Complaint which is identical to Mr. McCoy's Answer except to correct the spelling of Mr. McCoy's street address.
[6] Resp't's Resp. & Obj. to Mot. for Adoption of Proposed Decision and Order.
[7] Complainant's Resp. to Resp't's Obj. to Complainant's Proposed Decision & Order Upon Admission of Facts by Reason of Default.
[8] ALJ's Ruling Den. Default Judgment ¶ 6 at 2.
[9] Complainant's Petition for Appeal of the Administrative Law Judge's Denial of Complainant's Motion for Default Decision and Brief in Support Thereof [Appeal Petition].
[10] Respondent's Response to Complainant's Petition for Appeal of the Administrative Law Judge's Denial of Complainants [sic] Motion for Default Decision and Brief in Support Thereof [Response to Appeal Petition].

HORSE PROTECTION ACT

Statement of the Case

Mr. McCoy failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice provide the failure to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint.[11] Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. McCoy is an individual whose mailing address is in Kentucky.

2. On March 14, 2014, Mr. McCoy entered, for the purpose of showing or exhibiting, a horse known as "Puttin It On the Line" as entry number 507, in class number 25, at the 46th Annual National Walking Horse Trainers' Show in Shelbyville, Tennessee, while Puttin It On the Line was sore and bearing a prohibited substance.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Mr. McCoy violated 15 U.S.C. § 1824(2)(B) and (7) by entering, for the purpose of showing or exhibiting, a horse known as "Puttin It On the Line" as entry number 507, in class number 25, at the 46th Annual National Walking Horse Trainers' Show in Shelbyville, Tennessee, while Puttin It On the Line was sore and bearing a prohibited substance.

3. The Order in this Decision and Order is justified by the Findings of Fact and authorized by the Horse Protection Act.

III. THE ADMINISTRATOR'S APPEAL PETITION

[11] 7 C.F.R. § 1.136(c).

The Administrator contends the ALJ erroneously denied the Administrator's March 10, 2016 Motion for Default Decision. The Administrator requests that either I issue an order reversing the ALJ's April 21, 2016 Ruling Denying Default Judgment or I issue an order vacating the ALJ's April 21, 2016 Ruling Denying Default Judgment and remanding the proceeding to the ALJ for issuance of a decision in accordance with the Rules of Practice (Administrator's Appeal Pet. at 8).

The Administrator contends the ALJ erroneously found Mr. McCoy filed timely meritorious objections to the Administrator's March 10, 2016 Motion for Default Decision (Administrator's Appeal Pet. at 2-3). The Rules of Practice provide, after a respondent has failed to file an answer, the complainant shall file a proposed decision and a motion for adoption of that proposed decision. The respondent may file objections to the complainant's proposed decision and motion for adoption of that proposed decision at any time within twenty days after the Hearing Clerk serves the respondent with the complainant's proposed decision and motion for adoption of that proposed decision.[12] The Hearing Clerk served Mr. McCoy with the Administrator's Motion for Default Decision and Proposed Default Decision on March 16, 2016;[13] therefore, Mr. McCoy was required to file objections to the Administrator's Motion for Default Decision and Proposed Default Decision no later than April 5, 2016.

On March 22, 2016, Mr. McCoy filed a timely objection to the Administrator's Motion for Default Decision, which states in its entirety, as follows:

> **RESPONDENT'S RESPONSE AND OBJECTION TO MOTION FOR ADOPTION OF PROPOSED DECISION AND ORDER**
>
> Comes now the Respondent, Rocky Roy McCoy, and for his Response and Objection to Motion for Adoption of Proposed Decision and Order states as follows:

[12] 7 C.F.R. § 1.139.
[13] *See supra* note 3.

> The Respondent objects to the entry of the Proposed Decision and Order as the Respondent has now filed an Entry of Appearance and Answer to the Complaint in this matter.
>
> As such, Respondent requests that the Motion for Adoption of Proposed Decision and Order be denied.
>
> This the 22nd day of March, 2016.
>
> BRODERICK & DAVENPORT, PLLC
> 921 College St.
> P.O. Box 3100
> Bowling Green, KY 42102-3100
> Telephone: 270-782-6700
> Fax: 270-782-3110
> /s/
> DAVID F. BRODERICK
> R. TAYLOR BRODERICK

Neither the entry of appearance nor Mr. McCoy's late-filed Answer[14] constitutes a basis for denial of the Administrator's Motion for Default Decision,[15] as Mr. McCoy contends. Therefore, I find Respondent's Response and Objection to Motion for Adoption of Proposed Decision and Order, filed March 22, 2016, contains no meritorious objection to the Administrator's Motion for Default Decision.

On April 6, 2016, Mr. McCoy filed a Memorandum of Law in which Mr. McCoy raises additional objections to the Administrator's Motion for Default Decision. However, Mr. McCoy was required to file objections to the Administrator's Motion for Default Decision and Proposed Default Decision no later than April 5, 2016,[16] and Mr.

[14] The Hearing Clerk served Mr. McCoy with the Complaint on February 12, 2016; therefore, pursuant to 7 C.F.R. § 1.136(a), Mr. McCoy was required to file an answer no later than March 3, 2016. Mr. McCoy filed his Answer on March 22, 2016, 19 days after he was required to file his Answer.

[15] *See* McCourt, 64 Agric. Dec. 223, 242 (U.S.D.A. 2005) (stating a late-filed answer cannot cure a default).

[16] The Hearing Clerk served Mr. McCoy with the Administrator's Motion for Default Decision and Proposed Default Decision on March 16, 2016; therefore, pursuant to

McCoy's April 6, 2016 objections come too late to be considered. Therefore, I agree with the Administrator that the ALJ's consideration of the objections raised in Mr. McCoy's April 6, 2016 Memorandum of Law, is error. I conclude Mr. McCoy has failed to file timely meritorious objections to the Administrator's Motion for Default Decision and Proposed Default Decision.

The Administrator also contends, even if I were to find Mr. McCoy's April 6, 2016, Memorandum of Law timely filed, the Memorandum of Law does not contain meritorious objections to the Administrator's Motion for Default Decision and the ALJ's conclusions to the contrary are error and must be vacated or reversed (Administrator's Appeal Pet. at 3-4).

The ALJ found Mr. McCoy posited four meritorious objections to the Administrator's Motion for Default Decision in Mr. McCoy's April 6, 2016, Memorandum of Law. The ALJ adopted these four objections as "supporting reasons" for denial of the Administrator's Motion for Default Decision.

First, the ALJ found Mr. McCoy's financial difficulties, which prevented him from immediately procuring counsel, supporting reasons for denial of the Administrator's Motion for Default Decision:

> 7. Supporting Reason No. 1 for Denying Default Judgment: Respondent Rocky Roy McCoy's financial difficulties which kept him from immediately procuring counsel, have no doubt now been exacerbated by his having obtained counsel. I appreciate having good lawyers on both sides of a case, as we now have here. I do not prefer that Respondent Rocky Roy McCoy's expenditures to obtain counsel go to waste.

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7 C.F.R. § 1.139, Mr. McCoy was required to file objections to the Administrator's Motion for Default Decision and Proposed Default Decision no later than April 5, 2016. Mr. McCoy filed his Memorandum of Law on April 6, 2016, one day after he was required to file his objections to the Administrator's Motion for Default Decision and Proposed Default Decision.

ALJ's Ruling Den. Default Judgment ¶ 7 at 2. Mr. McCoy could have filed an answer pro se or requested an extension of time within which to file an answer while he resolved the financial difficulties that prevented him from procuring counsel. The Rules of Practice do not require payment of a fee for filing an answer or a request for an extension of time and the cost to a pro se respondent of filing an answer or a request for an extension of time is negligible. Therefore, I find Mr. McCoy's financial difficulties, which prevented him from procuring counsel immediately after the Hearing Clerk served him with the Complaint, are not meritorious reasons for denying the Administrator's Motion for Default Decision.

Second, the ALJ found the lack of prejudice to the Administrator a supporting reason for denying the Administrator's Motion for Default Decision:

> 8. Supporting Reason No. 2 for Denying Default Judgment: APHIS is not prejudiced by Rocky Roy McCoy being 2-1/2 weeks late in filing his Answer. If Rocky Roy McCoy, while he was representing himself (appearing *pro se*), had only known to telephone to request more time, he would have been instructed to file such request and would have been granted at least that 2-1/2 weeks.

ALJ's Ruling Denying Default Judgment ¶ 8 at 2. I have long held the lack of prejudice to the complainant is not a basis for denying the complainant's motion for a default decision.[17] Mr. McCoy, citing *Lion*

[17] Heartland Kennels, Inc., 61 Agric. Dec. 492, 538-39 (U.S.D.A. 2002) (stating, even if I were to find the complainant would not be prejudiced by setting aside the chief administrative law judge's default decision, that finding would not constitute a basis for setting aside the default decision); Noell, 58 Agric. Dec. 130, 146 (U.S.D.A. 1999) (stating, even if I were to find the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000); Byard, 56 Agric. Dec. 1543, 1561-62 (U.S.D.A. 1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to the complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

Raisins, Inc. v. U.S. Dep't of Agric., 2005 WL 6406066 (E.D. Cal. 2005), contends, where the complainant is not prejudiced by a late-filed answer, no default should be entered (Mr. McCoy's Resp. to Appeal Pet. at 2-3). However, unlike the instant proceeding, *Lion Raisins* is not a typical default case where a respondent fails to file a timely response to a complaint, but rather a case in which a respondent filed a timely response to the complaint "through a technically procedurally ineffective method":

> USDA was made aware of Lion Raisins' intent to defend itself in the matter when it received the motion to dismiss. Having been made aware of this intent, albeit through a technically procedurally ineffective method, USDA cannot possibly claim it would be prejudiced by the denial of the default and allowing the answer to be filed. This is unlike the typical default case, in which prejudice may be found where a party has failed to respond at all. Additionally, the ALJ took judicial notice on her own motion of the fact that all parties, including herself, were involved in a second matter involving the same issues. The existence of this parallel action, in which Lion Raisins was "defending vigorously," AR 50 at 4, further demonstrates lack of prejudice because, as the ALJ noted, it would be "ludicrous" to contemplate that Lion Raisins would default. Accordingly, there can be no argument that USDA somehow relied to its detriment on Lion Raisins' failure to file an answer.

Lion Raisins, Inc. v. U.S. Dep't of Agric., 2005 WL 6406066, at *8 (E.D. Cal. 2005) (footnote omitted). Therefore, I find *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 2005 WL 6406066 (E.D. Cal. 2005), inapposite. Nothing in the record indicates that I should deviate from the usual practice of rejecting lack of prejudice to the complainant as a basis for denying a complainant's motion for a default decision. I find lack of prejudice to the Administrator is not a meritorious reason for denying the Administrator's Motion for Default Decision.

Third, the ALJ found her preference for a decision on the merits, as opposed to a default decision, a supporting reason for denying the Administrator's Motion for Default Decision:

> 9. Supporting Reason No. 3 for Denying Default Judgment: Default Judgments are not preferred, because they are not decided on the merits. I would prefer to hold a hearing and decide the issues based on evidence. Further, if the parties are given time to negotiate, many Horse Protection Act cases such as this are resolved by the parties themselves, who prepare and sign a proposed Consent Decision for the judge's consideration. When the judge issues a Consent Decision, there is no further litigation: there is no appeal to the Judicial Officer, and there is no appeal to the U.S. Court of Appeals.

ALJ's Ruling Denying Default Judgment ¶ 9 at 2. An administrative law judge's preference for a decision on the merits, as opposed to a default decision, is not a meritorious reason for denial of a complainant's motion for a default decision. While I share the ALJ's preference for a decision on the merits, as opposed to a default decision, that preference is not a meritorious reason for denial of the Administrator's Motion for Default Decision.

Fourth, the ALJ found her preference that Mr. McCoy be provided with an explanation of an issue that could arise in the proceeding, a supporting reason for denying the Administrator's Motion for Default Decision:

> 10. Supporting Reason No. 4 for Denying Default Judgment: Rocky Roy McCoy has already dealt with the same alleged Horse Protection Act violation through the Horse Industry Organization SHOW. *See* p. 3 of Rocky Roy McCoy's Memorandum of Law. While that action will not bar this action, I would prefer that some explanation be provided to Rocky Roy McCoy.

ALJ's Ruling Den. Default Judgment ¶ 10 at 2. An administrative law judge's preference that a respondent be provided with an explanation of an issue that could arise in a proceeding does not constitute a meritorious reason for denial of a complainant's motion for a default decision. Moreover, the denial of a complainant's motion for a default decision is

not a necessary prerequisite to a respondent's receipt of an explanation of an issue that may arise in a proceeding. Often, an issue can be explained to a respondent without resort to a decision on the merits. The issue which the ALJ would prefer to have explained to Mr. McCoy has been discussed in previous decisions which are available to Mr. McCoy,[18] and, as the Administrator indicated,[19] Mr. McCoy's counsel may be able to provide Mr. McCoy with an explanation of the issue in question.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. McCoy is assessed a $2,200 civil penalty. Mr. McCoy shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. McCoy's civil penalty payment shall be forwarded to, and received by, USDA, APHIS, MISCELLANEOUS within sixty (60) days after service of this Order on Mr. McCoy. Mr. McCoy shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 16-0026.

2. Mr. McCoy is disqualified for one uninterrupted year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from

[18] Black, 66 Agric. Dec. 1217, 1224-26 (U.S.D.A. 2007), *aff'd sub nom.* Derickson v. U.S. Dep't of Agric., 546 F.3d 335 (6th Cir. 2008); McConnell, 64 Agric. Dec. 436, 467-69 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006) (unpublished); *see also* Back, 69 Agric. Dec. 448, 450 (U.S.D.A. 2010) (stating the issue of whether a sanction imposed by an entity other than the United States Department of Agriculture bars a subsequent enforcement action by the Administrator for the same event has been previously considered and answered adversely to alleged violators of the Horse Protection Act by both the Judicial Officer and the United States Court of Appeals for the Sixth Circuit in McConnell), *aff'd,* 445 F. App'x 826 (6th Cir. 2011).
[19] Administrator's Appeal Pet. at 7.

judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. The disqualification shall continue after the end of the one-year disqualification period until the $2,200 civil penalty assessed against Mr. McCoy is paid in full. The disqualification of Mr. McCoy shall become effective on the sixtieth (60th) day after service of this Order on Mr. McCoy.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. McCoy has the right to seek judicial review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. McCoy resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. McCoy must file a notice of appeal in such court within thirty (30) days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[20]

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In re: TRACY ESSARY.
Docket No. 15-0041.
Decision and Order.
Filed June 15, 2016.

HPA – Civil penalty, ability to pay – Disposal of animals - Violations, responsibility for.

Rupa Chilukuri, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

[20] 15 U.S.C. § 1825(b)(2), (c).

Tracy Essary
75 Agric. Dec. 204

DECISION AND ORDER

I. PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 8, 2014. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations promulgated under the Horse Protection Act (9 C.F.R. pt. 11); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges: (1) on August 25, 2012, Tracy Essary, in violation of 15 U.S.C. § 1824(2)(B) and (7), entered for the purpose of showing or exhibiting a horse known as "Jose's Diamond Doll" as entry number 820, in class number 76, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Jose's Diamond Doll was sore and bearing a prohibited substance;[1] and (2) on August 26, 2012, Mr. Essary, in violation of 15 U.S.C. § 1824(2)(D), allowed the entry for the purpose of showing or exhibiting a horse known as "Out On A Date" as entry number 819, in class number 91A, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Out On A Date was sore.[2] On March 11, 2015, Mr. Essary filed an answer in which he denied the allegations of the Complaint.[3]

On April 24, 2015, Administrative Law Judge Janice K. Bullard [ALJ] issued an order requiring the parties to exchange exhibits and lists of witnesses and exhibits.[4] On July 17, 2015, the Administrator complied with the ALJ's April 24, 2015 Order by filing Complainant's List of Anticipated Witnesses and Complainant's List of Proposed

[1] Compl. ¶ 6 at 2.
[2] Compl. ¶ 8 at 2.
[3] Undated letter from Mr. Essary to the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk].
[4] Order Setting Deadlines for Exchange and Submissions.

Exhibits with the Hearing Clerk and by sending a copy of the Administrator's proposed exhibits, Complainant's List of Anticipated Witnesses, and Complainant's List of Proposed Exhibits to Mr. Essary. Mr. Essary failed to comply with the ALJ's April 24, 2015 Order.

On December 22, 2015, the ALJ issued an Order directing Mr. Essary to show cause why a decision on the written record should not be entered and setting a date for the parties' submission of evidence and argument to be considered by the ALJ.[5] On January 29, 2016, the Administrator complied with the ALJ's December 22, 2015 Order by filing a Motion for Decision on the Record, exhibits in support of the Motion for Decision on the Record, a Memorandum of Points and Authorities in Support of a Decision on the Record, and a Proposed Decision and Order. Mr. Essary failed to comply with the ALJ's December 22, 2015 Order.

On February 23, 2016, the Hearing Clerk served Mr. Essary with the Administrator's Motion for Decision on the Record and the Administrator's Proposed Decision and Order.[6] Mr. Essary failed to file a response to the Administrator's Motion for Decision on the Record or the Administrator's Proposed Decision and Order.

On April 12, 2016, the ALJ issued a Decision and Order in which the ALJ: (1) admitted to the record the Administrator's exhibits (CX 1-CX 14) filed in support of the Administrator's Motion for Decision on the Record; (2) concluded Mr. Essary violated 15 U.S.C. § 1824(2)(B), (2)(D), and (7), as alleged in the Complaint; (3) assessed Mr. Essary a $4,400 civil penalty; and (4) disqualified Mr. Essary from showing, exhibiting, or entering any horse or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for a period of two years.[7]

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[5] Order Directing Respondents [sic] to Show Cause Why Decision on the Record Should Not Be Entered and Setting Date for Submissions. *See also* the ALJ's January 4, 2016, Addendum Order Directing Respondents [sic] to Show Cause Why Decision on the Record Should Not Be Entered and Setting Date for Submissions.

[6] United States Postal Service Domestic Return Receipt for article number XXXX 2890.

[7] ALJ's Decision and Order at 2, 5-6.

On May 11, 2016, Mr. Essary appealed the ALJ's Decision and Order to the Judicial Officer,[8] and, on June 6, 2016, the Administrator filed a response to Mr. Essary's Appeal Petition.[9] On June 8, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, pursuant to 7 C.F.R. § 1.145(i), I adopt the ALJ's April 12, 2016, Decision and Order as the final order in this proceeding.

II. DECISION

A. Mr. Essary's Appeal Petition

Mr. Essary raises three issues in his Appeal Petition. Mr. Essary raises each of these issues for the first time on appeal to the Judicial Officer. It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[10] Nonetheless, in this Decision and Order, *infra*, I briefly address each of the three issues raised by Mr. Essary.

First, Mr. Essary asserts Kevin Gower, the trainer of Jose's Diamond Doll and Out On A Date, pled guilty to, and accepted responsibility for, the violations of the Horse Protection Act alleged in the Complaint. Mr. Essary contends he is therefore not responsible for the violations of the Horse Protection Act alleged in the Complaint (Appeal Pet.).

The Administrator alleged that both Mr. Gower and Mr. Essary violated the Horse Protection Act.[11] Mr. Gower did not plead guilty to the violations of the Horse Protection Act which he is alleged to have committed, as Mr. Essary contends. Instead, Mr. Gower settled this proceeding as it relates to him by entering into a Consent Decision and

[8] Mr. Essary's letter to the ALJ, dated May 6, 2016 [Appeal Petition].
[9] Complainant's Resp. in Opposition to Respondent's Notice of Appeal [Response to Appeal Petition].
[10] ZooCats, Inc, 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009) (Order Den. Resp't's Pet. to Reconsider and Administrator's Pet. to Reconsider); Schmidt, 66 Agric. Dec. 596, 599 (U.S.D.A. 2007) (Order Den. Pet to Reconsider); Reinhart, 60 Agric. Dec. 241, 257 (U.S.D.A. 2001) (Order Den. William J. Reinhart's Pet. for Recons.).
[11] Specifically, the Administrator alleged Mr. Gower violated 15 U.S.C. § 1824(2)(B) and (7) (Compl. ¶¶ 6-7 at 2) and Mr. Essary violated 15 U.S.C. § 1824(2)(B), (2)(D), and (7) (Compl. ¶¶ 6 and 8 at 2).

Order in which he admitted the jurisdictional allegations in the Complaint but neither admitted nor denied the remaining allegations of the Complaint.[12] Mr. Gower's resolution of this proceeding as it relates to him by entry of a Consent Decision and Order is not relevant to the allegations in the Complaint that Mr. Essary violated the Horse Protection Act and does not dispose of the proceeding as to Mr. Essary.[13] Therefore, I reject Mr. Essary's contention that he is not responsible for the violations of the Horse Protection Act which the Administrator alleges Mr. Essary committed.

Second, Mr. Essary asserts he no longer owns any Tennessee Walking Horses (Appeal Pet.).

Mr. Essary does not indicate how his current lack of ownership of Tennessee Walking Horses is relevant to this proceeding. Mr. Essary does not cite and I cannot locate any case in which a respondent's termination of ownership of all Tennessee Walking Horses was relevant to a violation of the Horse Protection Act that occurred prior to that respondent's termination of ownership. However, I identified three proceedings conducted under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act], in which the respondents argued disposal or the intention to dispose of animals regulated under the Animal Welfare Act operated as a defense to their violations of the Animal Welfare Act which predated the disposal or the intent to dispose of animals regulated under the Animal Welfare Act. I rejected each of those arguments as having no merit.[14] Similarly, I find

[12] Gower, No. 15-0040, 2015 WL 8484476, at *1 (U.S.D.A. Mar. 31, 2015) (Consent Decision).

[13] After entry of *Gower*, No. 15-0040, 2015 WL 8484476 (U.S.D.A. Mar. 31, 2015) (Consent Decision), the ALJ amended the caption of this proceeding by omitting the references to "Kevin Gower" and "HPA Docket No. 15-0040" and maintaining the references to "Tracy Essary" and "HPA Docket No. 15-0041" in order to reflect that a final disposition of this proceeding had been entered as to Mr. Gower but that a final disposition of this proceeding had not been issued as to Mr. Essary (Order Setting Deadlines for Exchange and Submissions at 1 n.1).

[14] Hill, 64 Agric. Dec. 91, 147 (U.S.D.A. 2004) (finding the respondents' disposal or intention to dispose of animals after the respondents committed violations of the Animal Welfare Act is not a meritorious basis for denying the Administrator's motion for default decision or relevant to the proceeding), *appeal dismissed*, No. 05-1154 (7th Cir. Aug. 23, 2005); Meyers, 56 Agric. Dec. 322, 348 (U.S.D.A. 1997) (stating the respondent's disposal of animals regulated under the Animal Welfare Act is not a defense to the

Mr. Essary's assertion that he no longer owns any Tennessee Walking Horses is not a defense to the Administrator's allegations that Mr. Essary violated the Horse Protection Act and has no relevance to this proceeding.

Third, Mr. Essary asserts he is unable to pay the $4,400 civil penalty assessed by the ALJ (Appeal Pet.).

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200.[15] The Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, when determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the respondent's ability to pay the civil penalty.

While the Horse Protection Act requires that I take into account a respondent's ability to pay a civil penalty, the burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty.[16] Mr. Essary has not introduced any evidence indicating his inability to pay a $4,400 civil penalty, and, in the absence

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respondent's violation of the Animal Welfare Act that occurred prior to the disposal of the animals); Hampton, 56 Agric. Dec. 301, 320 (U.S.D.A. 1997) (stating the respondent's intention to dispose of animals regulated under the Animal Welfare Act is not a defense to the respondent's violation of the Animal Welfare Act).

[15] 7 C.F.R. § 3.91(b)(2)(viii).

[16] Sims, No. 15-0150, 2016 WL 2892945, at *4 (U.S.D.A. Apr. 29, 2016); Jenne, No. 13-0080, 2015 WL 4538827, at *8 (U.S.D.A. July 17, 2015); Jenne, No. 13-0308, 2015 WL 1776433, at *6 (U.S.D.A. Apr. 13, 2015); Stepp, 57 Agric. Dec. 297, 318 (U.S.D.A. 1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (U.S.D.A. Aug. 13, 1999); Oppenheimer, 54 Agric. Dec. 221, 321 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer); Armstrong, 53 Agric. Dec. 1301, 1324 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Burks, 53 Agric. Dec. 322, 346 (U.S.D.A. 1994); Holt, 49 Agric. Dec. 853, 865-66 (U.S.D.A. 1990).

of evidence to the contrary, I deem Mr. Essary capable of paying the $4,400 civil penalty.

Based upon a careful consideration of the record, I find no change or modification of the ALJ's April 12, 2016, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
> . . . .
> (i) *Decision of the judicial officer on appeal*. . . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 12, 2016, Decision and Order is adopted as the final order in this proceeding.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Essary has the right to seek judicial review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. Essary resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Essary must file a notice of appeal in such court within thirty (30)

days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[17]

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[17] 15 U.S.C. § 1825(b)(2), (c).

SALARY OFFSET ACT

SALARY OFFSET ACT

DEPARTMENTAL DECISIONS

In re: BRIAN N. STALLONS.
Docket No. 16-0023.
Decision and Order.
Filed February 2, 2016.

SOA.

Petitioner, pro se.
Dr. David Thompson for FSIS.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER

I. PRELIMINARY STATEMENT

This matter is before the Office of Administrative Law Judges [OALJ] upon the November 12, 2015, filing of a request by Brian N. Stallons [Petitioner] for a hearing to address the existence or amount of a debt alleged to be due to the Food Safety and Inspection Service [FSIS; Respondent] of the United States Department of Agriculture [USDA], and if established, the propriety of imposing administrative wage offset.

II. PROCEDURAL HISTORY

Petitioner's request for a hearing was forwarded to OALJ by FSIS on November 12, 2015, together with Petitioner's documents marked "Attachments 1 through 6" and "Summation." These documents constitute argument and are hereby identified as "Petitioner's Pre-hearing Argument."

Petitioner also filed schedules that are marked as "Pay Periods 01; 02; 04; 09; 11 and 18" and are hereby identified as "PX-1." Petitioner included copies of email correspondence dated October 22, 2014, hereby identified as "PX-2." Time and attendance records were also submitted and are hereby identified as "PX-3." Email correspondence dated September 30, 2014, is hereby identified as "PX-4." A POV Cost Comparison Worksheet is identified as "PX-5." Regulatory guidance

identified as "PX-6" and "PX-7" was submitted. Notice of Overpayment of Salary and Demand for payment and envelope information is identified as "PX-8" through "PX-10."

On January 13, Petitioner submitted supplemental argument and evidence consisting of agency regulations identified as "PX-11"; email communications at "PX-12, 13, and 14"; Earnings and Leave Statements, "PX-15- 18"; email communication of October 27, 2014, "PX-19"; and Cost comparison calculation at "PX-20." I have marked Petitioner's copy of "Notice of Intent to Request a Hearing" dated November 24, 2014 as "PX-21."

On November 12, 2015, Respondent submitted documents marked as FSIS' "administrative report" with attachments and "FSIS Directive 3800.1." The report is hereby identified as "RX-1." The email exchange attached thereto is hereby identified as "RX-2." A copy of OPM's "Hours of Work for Travel" is hereby identified as "RX-3."

FSIS requested an expedited hearing, and by Order issued January 13, 2016, I set a hearing to commence by telephone on January 20, 2016. I also set deadlines for the parties to file supplemental documents.

A telephonic hearing commenced as scheduled on January 20, 2016. Petitioner appeared as his own representative and testified. Dr. David Thompson, Deputy District Manager of the Jackson District for FSIS represented Respondent and testified. Evelyn C. McGovern, Chief Employment, Classification, and Compensation Branch, Human Resources Management Division of FSIS also testified.

All of the documentary evidence is hereby admitted to the record and the record is closed. This Decision and Order is based on the documentary and testamentary evidence and the arguments of the parties.

III. DISCUSSION OF THE EVIDENCE

Petitioner Brian Stallons has been employed by FSIS for twenty-nine years and has held the position of relief Consumer Safety Inspector ("CSI") for the past eight years. He works a flexible schedule that requires him to report to temporary duty stations on a regular basis. The

FSIS District Office located in Jackson, Mississippi issues him a weekly schedule that assigns duty locations to each CSI. *See* PX-1.

Mr. Stallons believed that he was responsible for determining whether staying at a temporary duty station or commuting back to his home would represent the most cost efficient method of travel. In order to make that assessment, Mr. Stallons conducted a cost comparison for assignments to Unionville, Kentucky in pay periods 1, 2, 4, 9, 11 and 18 of 2014, and concluded that it was more advantageous to the government to commute daily. *See* PX-5. When calculating the costs of commuting as compared with the cost of staying at the temporary duty station, Petitioner factored in the extra hours he would spend commuting, minus the time of his regular commute to his regular duty station. Petitioner identified those additional hours as overtime on time and attendance reports for those pay periods. Petitioner's time and attendance reports were approved by his supervisor Dr. Janey Kelso and he was paid for overtime accrued during a daily commute to and from the temporary duty station. PX-3.

On September 30, 2014, the Jackson District Office of FSIS received a report of non-reimbursable overtime hours, which found that Petitioner had reported working overtime that should not have been treated as paid overtime. After discussion between Dr. Thompson, Dr. Kelso, and Petitioner, Petitioner was directed to submit corrected time and attendance reports that removed some of the overtime hours in the pay periods in question. As a result, FSIS determined that Petitioner had been overpaid, and on November 16, 2014, he was issued a "Notice of Overpayment of Salary and Demand for Payment."

On November 26, 2014, Petitioner challenged that finding and filed a request for a hearing. PX-21. The request was not forwarded to FSIS to schedule a hearing, and as a result, salary offset was implemented. With the help of Ms. McGovern, the salary offset action eventually was suspended pending the results of a hearing on Petitioner's appeal.

A review of the documentary evidence demonstrates that Petitioner was instructed to stay at the temporary duty station, as his work schedules reflect "S." *See* PX-1. The work schedules state that employees with a commute of over sixty miles will stay and will be

entitled to travel overtime only on the first and last days of travel. On the same instructions, he is advised to "perform travel that is most advantageous to the Government" pursuant to Directive 3800.1.

I accord weight to Petitioner's testimony that his cost comparison indicated to him that it was to the government's benefit that he should commute. Petitioner's decision to commute was influenced by his understanding of Directive 3800.1. His time and attendance record included overtime for commuting hours that was initially approved by his supervisor, despite the explicit language on the work schedule directing him to stay and explaining that a commute of more than sixty miles indicated staying at the temporary duty station and prohibiting collecting overtime for commuting hours on days other than the first and last days of the detail.

I also accord weight to the testimony of Dr. Thompson, who believed that the sixty mile commuting standard was efficient and would serve to eliminate reviewing cost comparisons. The instructions on the work schedule explicitly direct employees with a commute of sixty miles to a temporary duty station to stay near the temporary work site. The agency has the regulatory authority to impose standards regarding when it will pay overtime for travel in such instances, and direct instructions such as those on the work schedules should not be subject to interpretation by employees.

It is clear that Petitioner took the exhortation to keep the government's benefit in mind when traveling on business when he prepared his cost comparison. However, he erred in his calculation by not considering the cost of mileage using a government vehicle. *See* RX-2. Had he done so, he should have concluded that his daily commute to a temporary work site was not in the government's interest.

Petitioner argued that he saved the government the cost of lodging. *See* PX-11. However, that is immaterial to my finding that he improperly collected overtime by commuting. Petitioner's work schedule clearly directed him to stay at the temporary housing. Applying the "plain meaning rule"[1] of statutory interpretation that, if the language of the

[1] Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

statute is clear, there is no need to look elsewhere to ascertain the statute's meaning to these circumstances, the instruction to employees to stay at a temporary site where a commute is more than sixty miles is plain. If Petitioner believed that the instruction to travel in a manner advantageous to the Government was contrary to the direct instruction to stay, he should have clarified his understanding with his supervisor.

Even accepting Petitioner's position that he had the duty to investigate whether a commute was economically beneficial to the government, despite clear instructions to stay, Petitioner should not have commuted. His calculations did not consider all costs, and therefore his decision to commute is not substantiated. Petitioner was not entitled to overtime pay for commuting travel on other than the first and last days of travel to and from the temporary work site.

In concluding that Petitioner was paid overtime hours that he should not have been paid, I have not considered actual costs of the commute versus staying. I base my determination solely upon Petitioner's interpretation of instructions and travel regulations, and his reliance upon a cost comparison that was erroneous. Although I credit Petitioner's intentions, his miscalculation demonstrates the utility of the work schedule instructions to stay at a temporary duty station when the commute exceeds sixty miles.

Petitioner filed an appeal of the salary offset determination and a request for a hearing within the time required. The agency failed to address the request and improperly offset his wages. However, as I have concluded that Petitioner was improperly paid overtime for commuting hours, the agency's error did not prejudice Petitioner.

IV. FINDINGS OF FACT

1. Petitioner is employed by FSIS as a Consumer Safety Inspector (CSI).

2. Petitioner was assigned to a detail at a location that was a round trip commute of 170 miles from his house.

3. Petitioner's work schedules for the pay periods at issue herein direct him to stay at the temporary duty station, and further note that if a

commute home is more than sixty hours, employees would not get overtime for travel other than on the first and last day of the assignment.

4. Petitioner's work schedules also direct employees to be mindful of performing travel in a manner advantageous to the government.

5. Lodging was located thirty miles from the temporary duty station.

6. Petitioner prepared a cost comparison that demonstrated to him that it was financially beneficial to the Government for him to commute from his residence to the temporary duty station for the duration of the detail.

7. Petitioner's cost comparison failed to include the cost of mileage on the government vehicle.

8. When the cost of mileage is added to Petitioner's original cost comparison, the results demonstrate that it was not in the government's interest for Petitioner to commute.

9. Petitioner is not entitled to overtime pay for commuting hours on other than the first and last day of travel.

10. Petitioner was erroneously paid overtime.

V. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA FSIS for the amount of overtime he was erroneously paid minus the amount of money that was taken from his salary through salary offset.

3. All procedural requirements for administrative salary offset have been met.

ORDER

For the foregoing reasons, Petitioner shall be subjected to administrative salary offset.

Petitioner is encouraged to negotiate repayment of the debt in installments.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

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In re: CHARLES MAXIMOWICZ.
Docket No. 16-0075.
Decision and Order.
Filed May 13, 2016.

SOA.

Petitioner, pro se.
Michael Wiggett for AFM.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER

I. PRELIMINARY STATEMENT

This matter is before the Office of Administrative Law Judges [OALJ] upon the March 3, 2016, filing of a request by Charles Maximowicz [Petitioner] for a hearing to address the existence or amount of a debt alleged to be due to the Office of Administrative and Financial Management [AFM; Respondent] of the United States Department of Agriculture [USDA], and if established, the propriety of imposing administrative wage offset.

II. PROCEDURAL HISTORY

I set a hearing to commence by telephone on May 12, 2016. On April 8, 2016, Respondent filed documents in support of its position and on May 11, 2016, Petitioner filed documents in support of his position. A

telephonic hearing commenced as scheduled. Petitioner appeared as his own representative and testified. Vivian Brooks-Marshall, Administrative Operations Specialist, Office of the Director, National Institute of Food and Agriculture, represented Respondent and testified. All of the documentary evidence is hereby admitted to the record and the record is closed. This Decision and Order is based on the documentary and testamentary evidence and the arguments of the parties.

III. DISCUSSION

The facts underlying this appeal are not in dispute. Respondent mistakenly offered Petitioner a retirement benefit to which he was not legally entitled and, for some time, erroneously enrolled him in an improper retirement system.

On June 17, 2014, William A. Duggan of AFM mailed Petitioner an employment package that referenced eligibility for benefits, including participation in retirement programs, including the Federal Employees Retirement System [FERS]. Petitioner began his employment with USDA on July 13, 2014, and was enrolled in FERS. Petitioner paid an employee contribution of 0.8% under that program. Several Standard Form 50s (notice of personnel action) issued in 2015 reflect that Petitioner's FERS participation was changed to FERS Further Revised Annuity Employee [FERS-FRAE] which increased employee contributions to 4.4%. Congress created FERS-FRAE upon the enactment of the Bipartisan Budget Act of 2013 [Budget Act], on December 26, 2013.

The Budget Act required an employee hired after December 31, 2013 to be covered by FERS-FRAE unless the employee met certain exceptions, including previous coverage under FERS for a period of five years. Petitioner had been enrolled in FERS while working for the census in 2010, and his prior service was credited for purposes of accumulating leave. However, Petitioner's prior service was of insufficient duration to entitle him to FERS coverage. Petitioner does not meet any other exception to exclude him from FERS-FRAE coverage.

Petitioner's salary was subsequently offset to reimburse the government for the overpayment that occurred as the result of USDA's

error regarding Petitioner. Several offset payments were captured from Petitioner's salary after Respondent's error was corrected. Petitioner argues that because he accepted and worked in his position for some time under FERS coverage he should be permitted to participate in FERS, and he demands for repayment of the overpayment should be dismissed. Alternately, Petitioner seeks that Respondent pay the difference between FERS and FERS-FRAE employee contributions for the duration of his employment with USDA.

The scope of my authority in the instant adjudication is to determine whether there exists a valid debt owed by Petitioner to the creditor agency and to establish a repayment schedule. 5 C.F.R. §§ 550.1104 (b)(2); (e)(1) and (2). I am not authorized to determine whether Petitioner was harmed by relying upon an offer of employment that contained erroneous information. While I sympathize with Petitioner's position and agree that the agency was at the very least careless in failing to comprehend and communicate the effects of the Budget Act legislation on hires after December, 2013, I am not empowered to address that issue.

The circumstances clearly establish that Respondent erroneously led Petitioner to believe that he was entitled to enrollment in the FERS retirement system, and that the error resulted in a significant economic disadvantage to Petitioner. However, since the enactment of the Budget Act requires new hires, or reinstated federal hires who do not meet exception criteria, to be enrolled in FERS-FRAE, Petitioner has no standing to request reinstatement in FERS.

In addition, I am not authorized to direct Respondent to pay the difference between FERS and FERS-FRAE contribution. Ms. Brooks-Marshall testified that the agency has agreed to cover the overpayments generated by the agency's erroneous retirement placement for affected employees. However, the total amount of overpayment has not yet been calculated, as a portion of the balance due must be calculated manually. Therefore, I am unable to determine the amount of the valid debt due by Petitioner. In addition, the date of the correction of Petitioner's retirement calculation has not been firmly established.

Accordingly, Respondent is hereby directed to provide to Petitioner an accurate and complete calculation of the amount due to the agency by not later than sixty (60) days from the date of this Decision and Order. That calculation must include credit for those amounts deducted from Petitioner's salary through offset.

As I have concluded that Petitioner owes a valid debt to USDA, the agency's error in collecting overpayment through salary offset does not prejudice Petitioner. However, if Respondent reimburses employees for overpayments, those salary offset deductions should be considered in the final calculation of what Respondent shall pay.

IV. FINDINGS OF FACT

1. Respondent's job offer to Petitioner included reference to his eligibility for enrollment in the FERS retirement system.

2. Petitioner was enrolled in FERS for some period of time after commencing his employment on July 13, 2014.

3. Petitioner is not eligible for FERS retirement because he began his employment after December 31, 2013, and his circumstances do not provide exception to enrollment in FERS-FRAE.

4. Respondent corrected Petitioner's retirement enrollment, thereby creating an overpayment in the amount of the difference between FERS employee contributions of .8% and FERS-FRAE contributions of 4.4%, for the period commencing with the start of his employment in July, 2014, until the date that Respondent made the correction in Petitioner's retirement coverage.

5. Petitioner's debt to Respondent for overpayment is valid.

6. The date of correction has not been determined, and therefore, the amount due cannot be determined.

V. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA for the difference in the employee contributions for erroneous enrollment in FERS and the employee contributions for the correct retirement system, FERS-FRAE.

3. All procedural requirements for administrative salary offset have been met.

ORDER

For the foregoing reasons, Petitioner shall be subjected to administrative salary offset, upon the calculation of the amount of the indebtedness.

Respondent must provide a complete and accurate calculation of the debt to Petitioner within sixty (60) days of this Decision and Order. The calculation must consider the amounts of offsets that have been taken against Petitioner's salary.

Petitioner is encouraged to negotiate repayment of the debt in installments, unless Respondent waives the right to repayment.

No offsets of Petitioner's salary shall be made until after 120 days from the date of this Decision and Order. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. *See* 31 C.F.R. § 285.13.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

AGREEMENTS & ORDERS

In re: MILK IN CALIFORNIA.
Docket No. 15-0071.
Certification of Transcript.
Filed March 3, 2016.

In re: RAISINS PRODUCED FROM GRAPES IN CALIFORNIA.
Docket No. 16-0016.
Filing of Notice of Hearing on Proposed Rulemaking.
Filed April 25, 2016.

ANIMAL WELFARE ACT

In re: OXCART INDUSTRY SERVICES, INC., d/b/a LISA'S CRITTERS FOR SENIORS, ET AL.
Docket No. 15-0180.
Miscellaneous Order.
Filed January 8, 2016.

In re: BODIE S. KNAPP, an individual d/b/a THE WILD SIDE.
Docket No. 09-0175.
Miscellaneous Order.
Filed January 21, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Phillip Westergren, Esq., for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER AMENDING SCHEDULE FOR FILING BRIEFS ON REMAND

On October 20, 2015, I issued *Knapp*, AWA 09-0175, 2015 WL 7687427 (U.S.D.A. Oct. 20, 2015) (Order Setting Schedule for Filing Briefs on Remand). On January 11, 2016, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Second Request to Amend Schedule for Filing Briefs on Remand requesting that I amend the schedule for filing briefs on remand by extending the time for filing the Administrator's brief on remand from January 12, 2016, to January 14, 2016, and by extending the time for filing Bodie S. Knapp's response to the Administrator's brief on remand from March 2, 2016, to March 4, 2016. On January 12, 2016, counsel for the Administrator, by telephone, informed the Office of the Judicial Officer that counsel for Mr. Knapp had no objection to the Administrator's request to amend the schedule for filing briefs on remand.

For good reason stated, the Administrator's January 11, 2016, request to amend the schedule for filing briefs on remand is granted. The time for filing the Administrator's brief on remand is extended to, and includes, January 14, 2016. The time for filing Mr. Knapp's response to the Administrator's brief on remand is extended to, and includes, March 4, 2016.[1]

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[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his brief on remand is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, January 14, 2016, and Mr. Knapp must ensure his response to the Administrator's brief on remand is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, March 4, 2016.

In re: BODIE S. KNAPP, an individual d/b/a THE WILD SIDE.
Docket No. 09-0175.
Miscellaneous Order.
Filed January 14, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Phillip Westergren, Esq., for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER AMENDING SCHEDULE FOR FILING BRIEFS ON REMAND

On October 20, 2015, I issued *Knapp*, AWA 09-0175, 2015 WL 7687427 (U.S.D.A. Oct. 20, 2015) (Order Setting Schedule for Filing Briefs on Remand). On January 14, 2016, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I amend the schedule for filing briefs on remand by extending the time for filing the Administrator's brief on remand from January 14, 2016, to January 22, 2016, and by extending the time for filing Bodie S. Knapp's response to the Administrator's brief on remand from March 4, 2016, to March 14, 2016.

For good reason stated, the Administrator's January 14, 2016, request to amend the schedule for filing briefs on remand is granted. The time for filing the Administrator's brief on remand is extended to, and includes, January 22, 2016. The time for filing Mr. Knapp's response to the Administrator's brief on remand is extended to, and includes, March 14, 2016.[1]

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[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his brief on remand is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, January 22, 2016, and Mr. Knapp must ensure his response to the Administrator's brief on remand is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, March 14, 2016.

In re: BODIE S. KNAPP, an individual d/b/a THE WILD SIDE.
Docket No. 09-0175.
Miscellaneous Order.
Filed January 28, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Phillip Westergren, Esq., for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

FOURTH ORDER AMENDING SCHEDULE FOR FILING BRIEFS ON REMAND

On October 20, 2015, I issued *Knapp*, AWA 09-0175, 2015 WL 7687427 (U.S.D.A. Oct. 20, 2015) (Order Setting Schedule for Filing Briefs on Remand). On January 21, 2016, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I amend the schedule for filing briefs on remand by extending the time for filing the Administrator's brief on remand from January 22, 2016, to the next day the Hearing Clerk's office is open to receive documents. On January 26, 2016, counsel for the Administrator informed the Office of the Judicial Officer, by telephone, that counsel for Bodie S. Knapp had no objection to the Administrator's request to amend the briefing schedule, as long as Mr. Knapp's time for filing a response to the Administrator's brief on remand is extended for a period of time similar to any extension granted to the Administrator.

The Hearing Clerk's Office normally receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except federal holidays; however, due to inclement weather, the Hearing Clerk's Office was not open to receive documents during the period January 22, 2016, through January 26, 2016, and opened late on January 27-28, 2016. In light of the weather related closure and delayed opening of the Hearing Clerk's Office, the Administrator's January 21, 2016, request to amend the schedule for filing the Administrator's brief on remand is granted. The time for filing the Administrator's brief on remand is extended ten (10) days from January 22, 2016, to, and including,

February 1, 2016. The time for filing Mr. Knapp's response to the Administrator's brief on remand is extended ten (10) days from March 14, 2016, to, and including, March 24, 2016.[1]

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In re: OXCART INDUSTRY SERVICES, INC., d/b/a LISA'S CRITTERS FOR SENIORS.
Docket No. 15-0180.
Miscellaneous Order.
Filed February 11, 2016.

AWA – Administrative procedure – Appeal, time for filing – Decision, definition of.

Lisa Lopez for Oxcart Industry Services, Inc.
Colleen A. Carroll, Esq., for Respondent.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DISMISSING APPEAL

PROCEDURAL HISTORY

On December 7, 2015, Oxcart Industry Services, Inc., filed Petitioner/Applicant's Motion for Summary Decision [Motion for Summary Decision]. On December 31, 2015, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a response in opposition to Oxcart Industry Services, Inc.'s Motion for Summary Decision.

On January 8, 2016, Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] issued an Order Denying Motion for Summary Decision and Resetting Deadlines for Submissions [Order Denying Motion for Summary Decision]. On February 8, 2016, Oxcart Industry Services, Inc., appealed the Chief ALJ's Order Denying Motion for Summary Decision to the Judicial Officer. On February 9, 2016, the

[1] To ensure timely filing, the Administrator must ensure his brief on remand is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 1, 2016, and Mr. Knapp must ensure his response to the Administrator's brief on remand is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, March 24, 2016.

Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Based upon a careful consideration of the record, I conclude Oxcart Industry Services, Inc.'s appeal of the Chief ALJ's January 8, 2016, Order Denying Motion for Summary Decision must be dismissed.

The rules of practice applicable to this proceeding[1] provide only for appeal of an administrative law judge's decision to the Judicial Officer and limit the time during which a party may file an appeal to a thirty-day period after receiving service of an administrative law judge's written decision and to a thirty-day period after issuance of an administrative law judge's oral decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a). The Rules of Practice define the word "decision," as follows:

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [the Rules of Practice].

1.132 Definitions.

> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
> . . . .
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The Chief ALJ's January 8, 2016, Order Denying Motion for Summary Decision is not a "decision" as that word is defined in the Rules of Practice. Moreover, the Chief ALJ has not yet issued an initial decision in this proceeding in accordance with 5 U.S.C. §§ 556 and 557. Therefore, Oxcart Industry Services, Inc.'s February 8, 2016, appeal petition must be rejected as premature.

The Rules of Practice provide that, within specified time limits after the administrative law judge has issued a decision, a party who disagrees with any ruling by the administrative law judge may appeal the administrative law judge's decision to the Judicial Officer;[2] however, the Rules of Practice do not permit an interlocutory appeal of an administrative law judge's ruling.[3]

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[2] 7 C.F.R. § 1.145(a).

[3] Spinale, No. D-09-0189, No. 10-0138, 2014 WL 4311072 (U.S.D.A. Aug. 5, 2014) (Order Dismissing Interlocutory Appeal) (dismissing the respondents' interlocutory appeal of an administrative law judge's ruling denying the respondents' request for continuance of the hearing); Lion Raisins, Inc., 63 Agric. Dec. 830, 834 (U.S.D.A. 2004)

For the foregoing reasons, the following Order is issued.

ORDER

Oxcart Industry Services, Inc.'s February 8, 2016, appeal of the Chief ALJ's January 8, 2016, Order Denying Motion for Summary Decision, is dismissed.

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In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152; 15-0153; 15-0154; 15-0155.
Miscellaneous Order.
Filed February 26, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq., for Respondent.
Initial Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING THE ADMINISTRATOR'S RESPONSE TO THE ANIMAL LEGAL DEFENSE FUND'S APPEAL PETITION

(Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion) (dismissing the respondents' interlocutory appeal of an administrative law judge's ruling denying the respondents' motion for summary judgment); Velasam Veal Connection, 55 Agric. Dec. 300, 304 (U.S.D.A. 1996) (Order Dismissing Appeal) (dismissing the respondents' interlocutory appeal of an administrative law judge's postponement of a ruling on respondents' request for reinstatement of inspection services and immediate hearing); Feuerstein, 48 Agric. Dec. 896 (U.S.D.A. 1989) (Order Dismissing Appeal) (dismissing the respondent's interlocutory appeal of an administrative law judge's ruling denying the respondent's motion to dismiss); Landmark Beef Processors, Inc., 43 Agric. Dec. 1541 (U.S.D.A. 1984) (Order Dismissing Appeal) (dismissing the respondent's interlocutory appeal filed prior to the respondent's receiving service of an administrative law judge's decision); LeaVell, 40 Agric. Dec. 783 (U.S.D.A. 1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.) (dismissing the respondent's interlocutory appeal of an administrative law judge's ruling denying the respondent's motion to dismiss).

On February 25, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a request that I extend to February 29, 2016, the time for filing the Administrator's response to an appeal petition filed by the Animal Legal Defense Fund. For good reason stated, the Administrator's motion to extend the time for filing a response to the Animal Legal Defense Fund's appeal petition is granted. The time for filing the Administrator's response to the Animal Legal Defense Fund's appeal petition is extended to, and includes, February 29, 2016.[1]

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In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152; 15-0153; 15-0154, 15-0155.
Miscellaneous Order.
Filed March 1, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq., for Respondent.
Initial Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S SECOND REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE ANIMAL LEGAL DEFENSE FUND'S APPEAL PETITION

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to the Animal Legal Defense Fund's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 29, 2016.

On February 29, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Second Request for Extension of Time requesting that I extend to March 1, 2016, the time for filing the Administrator's response to an appeal petition filed by the Animal Legal Defense Fund. For good reason stated, the Administrator's second request to extend the time for filing a response to the Animal Legal Defense Fund's appeal petition is granted. The time for filing the Administrator's response to the Animal Legal Defense Fund's appeal petition is extended to, and includes, March 1, 2016.[1]

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In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152; 15-0153; 15-0154, 15-0155.
Miscellaneous Order.
Filed March 2, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq., for Respondent.
Initial Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S THIRD REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE ANIMAL LEGAL DEFENSE FUND'S APPEAL PETITION

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to the Animal Legal Defense Fund's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, March 1, 2016.

On March 1, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Third Request for Extension of Time requesting that I extend to March 3, 2016, the time for filing the Administrator's response to an appeal petition filed by the Animal Legal Defense Fund. For good reason stated, the Administrator's third request to extend the time for filing a response to the Animal Legal Defense Fund's appeal petition is granted. The time for filing the Administrator's response to the Animal Legal Defense Fund's appeal petition is extended to, and includes, March 3, 2016.[1]

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In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152; 15-0153; 15-0154, 15-0155.
Miscellaneous Order.
Filed March 3, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq., for Respondent.
Initial Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S FOURTH REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE ANIMAL LEGAL DEFENSE FUND'S APPEAL PETITION

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to the Animal Legal Defense Fund's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, March 3, 2016.

On March 3, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], orally requested that I extend to March 7, 2016, the time for filing the Administrator's response to an appeal petition filed by the Animal Legal Defense Fund. For good reason stated, the Administrator's fourth request to extend the time for filing a response to the Animal Legal Defense Fund's appeal petition is granted. The time for filing the Administrator's response to the Animal Legal Defense Fund's appeal petition is extended to, and includes, March 7, 2016.[1]

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In re: TIMOTHY L. STARK, an individual.
Docket No. 15-0080.
Miscellaneous Order.
Filed March 3, 2016.

AWA.

Colleen A. Carroll, Esq., for Complainant.
David E. Mosley, Esq., for Respondent.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DIRECTING THE HEARING CLERK TO SERVE MR. MOSLEY AND MR. RUSH WITH ALL PLEADINGS, ORDERS, AND DOCUMENTS

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his response to the Animal Legal Defense Fund's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, March 7, 2016.

On March 23, 2015, David E. Mosley of Mosley, Bertrand & McCall, Jeffersonville, Indiana, entered an appearance as counsel on behalf of Timothy L. Stark. On October 5, 2015, C. Richard Rush, of the Rush Law Office, New Albany, Indiana, entered an appearance as counsel on behalf of Mr. Stark. On January 11, 2016, Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] issued a Decision and Order Denying and Granting Summary Judgment [Decision and Order] in which the Chief ALJ noted that neither Mr. Mosley nor Mr. Rush had withdrawn his appearance and ordered service of all pleadings, orders, and other documents on both Mr. Mosley and Mr. Rush.[1]

On February 11, 2016, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], appealed the Chief ALJ's Decision and Order to the Judicial Officer.[2] On February 29, 2016, Mr. Stark, filed a response in opposition to the Administrator's Appeal Petition.[3] On March 1, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision, and the proceeding is now within my jurisdiction.

The record does not indicate that either Mr. Mosley or Mr. Rush has withdrawn his appearance on behalf of Mr. Stark or that the Hearing Clerk has served Mr. Rush with the pleadings, orders, and other documents filed in this proceeding, as ordered by the Chief ALJ. I direct the Hearing Clerk to comply with the Chief ALJ's January 11, 2016, order by: (1) serving Mr. Rush with all pleadings, orders, and other documents filed in this proceeding; and (2) serving Mr. Mosley with any pleadings, orders, and other documents that the Hearing Clerk has not previously served on Mr. Mosley.

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[1] Chief ALJ's Decision and Order ¶ III at 2.
[2] Complainant's Petition for Appeal and Supporting Brief [Appeal Petition].
[3] Respondent Stark's Resp. in Opposition to Complainant's Appeal.

In re: VIRGINIA SAFARI PARK AND PRESERVATION CENTER, INC., a/k/a VIRGINIA SAFARI PARK, INC., a Virginia corporation; MEGHAN MOGENSEN, an individual; and ERIC MOGENSEN, an individual.
Docket Nos. 15-0107, 15-0108, 15-0109, 15-0116.
Miscellaneous Order.
Filed March 10, 2016.

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152; 15-0153; 15-0154, 15-0155.
Miscellaneous Order.
Filed March 1, 2016.

AWA – APA – Administrative procedure – Adjudications – Decision, definition of – Interested person – Third party, intervention of.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq., for Respondent.
Initial Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING APPEAL

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this administrative disciplinary proceeding on July 30, 2015, by filing a Complaint. The Administrator instituted this proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act];[1] the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice]. The Administrator alleges Cricket Hollow Zoo, Inc.; Pamela J. Sellner; Thomas J. Sellner; and Pamela J. Sellner Tom J.

[1] *See*, *in particular*, 7 U.S.C. § 2149.

Sellner, d/b/a Cricket Hollow Zoo [Respondents], willfully violated the Animal Welfare Act and the Regulations.[2]

On October 28, 2015, the Animal Legal Defense Fund filed a motion for leave to intervene in this proceeding.[3] The Respondents and the Administrator each filed a response in opposition to the Animal Legal Defense Fund's Motion to Intervene.[4] On December 4, 2015, the Animal Legal Defense Fund filed a reply to the Administrator's response to the Animal Legal Defense Fund's Motion to Intervene.[5]

On December 30, 2015, Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] issued an Order Denying Motion to Intervene. On February 4, 2016, the Animal Legal Defense Fund appealed the Chief ALJ's Order Denying Motion to Intervene to the Judicial Officer.[6] On March 7, 2016, the Administrator filed a response in opposition to the Animal Legal Defense Fund's Appeal Petition and Appeal Brief.[7] The Respondents failed to file a response to the Animal Legal Defense Fund's Appeal Petition and Appeal Brief, and, on March 10, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Animal Legal Defense Fund's Request for Oral Argument

The Animal Legal Defense Fund's request for oral argument,[8] which

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[2] Compl. ¶¶ 9-19 at 3-20.
[3] Motion for Leave to Intervene by the Animal Legal Defense Fund [Motion to Intervene].
[4] Resistance to Mot. for Leave to Intervene by the Animal Legal Defense Fund filed by the Resp'ts on November 23, 2015; Complainant's Resp. to Mot. to Intervene filed by the Administrator on November 23, 2015.
[5] Animal Legal Defense Fund's [Requested] Reply to Complainant's Resp. to Mot. to Intervene.
[6] Petition Appealing Order Denying Animal Legal Defense Fund's Motion to Intervene & Request for Oral Argument [Appeal Petition] and Brief in Support of Petition Appealing Order Denying Animal Legal Defense Fund's Motion to Intervene [Appeal Brief].
[7] Complainant's Resp. to Pet. for Appeal.
[8] Appeal Pet. at 2.

the Judicial Officer may grant, refuse, or limit,[9] is refused because the issues raised in the Animal Legal Defense Fund's Appeal Petition have been thoroughly briefed by the Animal Legal Defense Fund and the Administrator and oral argument would serve no useful purpose.

Discussion

Based upon a careful consideration of the record, I conclude the Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene must be denied.

The Animal Legal Defense Fund takes no position on whether this proceeding is formal adjudication or informal adjudication; however, the Animal Legal Defense Fund argues 5 U.S.C. § 554(c) requires agencies to give all third parties an opportunity to participate in formal adjudications and 5 U.S.C. § 555(b) requires agencies to provide an avenue for the involvement of interested persons in informal adjudications (Appeal Brief ¶ III(a)(i)-(ii) at 7-10).

The Administrative Procedure Act requires agencies to give "interested parties" an opportunity to participate in formal adjudications, as follows:

> **§ 554. Adjudications**
> . . . .
> (c) The agency shall give all interested parties opportunity for—
> (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
> (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice in accordance with sections 556 and 557 of this title.

[9] 7 C.F.R. § 1.145(d).

5 U.S.C. § 554(c). The Administrative Procedure Act does not define the term "interested parties"; however, the Administrative Procedure Act defines the term "party," as follows:

> **§ 551. Definitions**
>
> For the purpose of this subchapter—
> . . . .
> (3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes[.]

5 U.S.C. § 551(3). The Animal Legal Defense Fund is not named or admitted as a party in this proceeding and, while the Animal Legal Defense Fund argues it should be permitted to intervene in this proceeding, I find no basis for concluding that the Animal Legal Defense Fund is "entitled as of right to be admitted as a party." Therefore, I find the Animal Legal Defense Fund is not an "interested party," as that term is used in 5 U.S.C. § 554(c), and I reject the Animal Legal Defense Fund's contention that 5 U.S.C. § 554(c) requires the United States Department of Agriculture to allow the Animal Legal Defense Fund to participate in this proceeding.

The Administrative Procedure Act provides for the appearance of "interested persons" in agency proceedings, as follows:

> **§ 555. Ancillary matters**
> . . . .
> (b) . . . . So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.

5 U.S.C. § 555(b). The Administrative Procedure Act does not define

the term "interested person"; however, even if I were to find that the Animal Legal Defense Fund is an "interested person," as that term is used in 5 U.S.C. § 555(b), I would deny the Animal Legal Defense Fund's Appeal Petition because the appearance of the Animal Legal Defense Fund in this proceeding would disrupt the orderly conduct of public business.

As the Chief ALJ explained, the only issues in this Animal Welfare Act enforcement proceeding are whether the Respondents committed the violations of the Animal Welfare Act and the Regulations alleged in the Complaint and, if the Respondents are found to have committed some or all of the alleged violations, the appropriate sanction that should be imposed on the Respondents.[10] The Animal Legal Defense Fund's stated interests in this proceeding are beyond the scope of this proceeding. Neither the Animal Welfare Act nor enforcement proceedings instituted under the Animal Welfare Act are for the purpose of furthering the Animal Legal Defense Fund's interests. Rather, the purposes of the Animal Welfare Act are set out in the congressional statement of policy in 7 U.S.C. § 2131, and enforcement proceedings instituted under the Animal Welfare Act are designed to accomplish the purposes of the Animal Welfare Act.

Moreover, 7 U.S.C. § 2149, the statutory provision under which this proceeding is conducted, provides that, prior to the imposition of an administrative sanction, a dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale who allegedly violates the Animal Welfare Act must be given notice and opportunity for hearing.[11] The Animal Welfare Act does not give third parties the right to participate in administrative disciplinary proceedings instituted by the Administrator against dealers, exhibitors, research facilities, intermediate handlers, carriers, or operators of auction sales pursuant to 7 U.S.C. § 2149. Further, while the Rules of Practice do not explicitly foreclose intervention, the Rules of Practice do not explicitly provide for intervention by third parties,[12] and the Judicial Officer has long held that

[10] Chief ALJ's Order Den. Mot.to Intervene.
[11] 7 U.S.C. § 2149(a)-(b).
[12] The United States Department of Agriculture conducts proceedings in which third parties are allowed to intervene; however, the rules of practice applicable to those proceedings explicitly provide for intervention. *See*, *e.g.*, 7 C.F.R. § 1.171 (expressly

the Rules of Practice do not provide for intervention by third parties.[13]

As the Administrative Procedure Act does not require that the Chief ALJ allow the Animal Legal Defense Fund to intervene in this proceeding and neither the Animal Welfare Act nor the Rules of Practice provide for intervention in an administrative disciplinary proceeding conducted pursuant to 7 U.S.C. § 2149, I deny the Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene.

Even if I were to find the Animal Legal Defense Fund could intervene in this proceeding (which I do not so find) and the Animal Legal Defense Fund is a party that, under the Rules of Practice, may appeal an administrative law judge's ruling to the Judicial Officer,[14] I would deny the Animal Legal Defense Fund's February 4, 2016, appeal of the Chief

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providing that the Judicial Officer or an administrative law judge may permit a person, upon a showing of substantial interest in the outcome of a proceeding, to intervene in a proceeding conducted under the cease and desist provisions of the Capper-Volstead Act (7 U.S.C. §§ 291-292)); 7 C.F.R. § 15.67 (expressly providing that a hearing officer may grant a petition to intervene in a proceeding conducted by the United States Department of Agriculture pursuant to title VI, section 602, of the Civil Rights Act of 1964 (42 U.S.C. § 2000d-1)); 7 C.F.R. § 47.12 (expressly providing that the Secretary of Agriculture or an examiner may permit a person, upon good cause shown, to intervene in a reparation proceeding instituted under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)); 7 C.F.R. § 900.57 (expressly providing that the Secretary of Agriculture or an administrative law judge may permit a person, upon a showing of substantial interest in the outcome of a proceeding, to intervene in a proceeding to consider a petition to modify or to be exempted from a marketing order); 9 C.F.R. § 202.121 (expressly providing that a presiding officer may permit a person, upon good cause shown, to intervene in a reparation proceeding instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b)).

[13] *See* Meadowbrook Farms Coop., 68 Agric. Dec. 1170, 1174 (U.S.D.A. 2009) (Order Den. Appeal Pet.) (stating the Rules of Practice make no provision for intervention in a disciplinary proceeding, which is a matter solely between the respondent and the complainant); Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1243 (U.S.D.A. 1995) (same), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom.* Heimann v. Dep't of Agric., 522 U.S. 951 (1997); Syracuse Sales Co., 52 Agric. Dec. 1511, 1513 (U.S.D.A. 1993) (same), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); Bananas, Inc., 42 Agric. Dec. 426 (U.S.D.A.1983) (Order Den. Intervention) (same).

[14] *See* Marine Mammal Conservancy, Inc. v. Dep't of Agric., 134 F.3d 409, 413 (D.C. Cir. 1998) (stating we do not view 7 C.F.R. § 1.145(a) as a clear bar to Marine Mammal Conservancy, Inc.'s appeal of the administrative law judge's refusal to allow it to intervene).

ALJ's December 30, 2015, Order Denying Motion to Intervene. The Rules of Practice provide only for appeal of an administrative law judge's decision to the Judicial Officer and limit the time during which a party may appeal an administrative law judge's decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a). The Rules of Practice define the word "decision," as follows:

> **1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
> . . . .
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The Chief ALJ's December 30, 2015, Order Denying Motion to Intervene is not a "decision" as that word is defined in the Rules of Practice. Moreover, the Chief ALJ has not yet issued an initial decision in this proceeding in accordance with 5 U.S.C. §§ 556 and 557. Therefore, even if I were to find the Animal Legal Defense Fund could intervene in this proceeding and the Animal Legal Defense Fund is a "party," as that word is used in 7 C.F.R. § 1.145(a), the Animal Legal Defense Fund's appeal of the Chief ALJ's ruling denying the Animal Legal Defense Fund's Motion to Intervene would be rejected as premature.

The Rules of Practice provide that, within specified time limits after the administrative law judge has issued a decision, a party who disagrees with any ruling by the administrative law judge may appeal the administrative law judge's decision to the Judicial Officer;[15] however, the Rules of Practice do not permit an interlocutory appeal of an administrative law judge's ruling.[16]

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[15] 7 C.F.R. § 1.145(a).

[16] Oxcart Industry Services, Inc., No. 15-0180, 2016 WL 692537, at *2 (U.S.D.A. Feb. 11, 2016) (Order Dismissing Appeal) (dismissing the respondent's interlocutory appeal of an administrative law judge's ruling denying the respondent's motion for summary decision); Spinale, No. D-09-0189, No. 10-0138, 2014 WL 4311072, at *2 (U.S.D.A. Aug. 5, 2014) (Order Dismissing Interlocutory Appeal) (dismissing the respondents' interlocutory appeal of an administrative law judge's ruling denying the respondents' request for continuance of the hearing); Black, 64 Agric. Dec. 681, 684 (U.S.D.A. 2005) (Order Dismissing Interlocutory Appeal) (dismissing the complainant's interlocutory appeal of an administrative law judge's order deferring consideration of the complainant's motion for a default decision); Lion Raisins, Inc., 63 Agric. Dec. 830, 834 (U.S.D.A. 2004) (Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion) (dismissing the respondents' interlocutory appeal of an administrative law judge's ruling denying the respondents' motion for summary judgment); Velasam Veal Connection, 55 Agric. Dec. 300, 304 (U.S.D.A. 1996) (Order Dismissing Appeal) (dismissing the respondents' interlocutory appeal of an administrative law judge's postponement of a ruling on the respondents' request for reinstatement of inspection services and immediate hearing); Feuerstein, 48 Agric. Dec. 896 (U.S.D.A. 1989) (Order Dismissing Appeal) (dismissing the respondent's interlocutory appeal of an administrative law judge's ruling denying the respondent's motion to dismiss); Landmark Beef Processors, Inc., 43 Agric. Dec. 1541 (U.S.D.A. 1984) (Order Dismissing Appeal) (dismissing the respondent's interlocutory appeal filed prior to the respondent's receiving service of an administrative law judge's written decision); LeaVell, 40 Agric. Dec. 783 (U.S.D.A. 1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.) (dismissing the respondent's

For the foregoing reasons, the following Order is issued.

ORDER

The Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene, is denied.

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In re: THOMAS J. COLEMAN.
Docket No. 16-0025.
Order Dismissing Complaint.
Filed April 13, 2016.

In re: DOUGLAS KEITH TERRANOVA, an individual, and TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Miscellaneous Order.
Filed April 15, 2016.

In re: MONROE H. HOCHTSTETLER.
Docket No. 15-0176.
Order of Dismissal.
Filed April 25, 2016.

In re: SANTA CRUZ BIOTECHNOLOGY, INC.
Docket Nos. 12-0536, 15-0023, 15-0165.
Miscellaneous Order.
Filed May 19, 2016.

In re: EXOTIC FELINE RESCUE CENTER, INC., an Indiana corporation d/b/a EXOTIC FELINE RESCUE CENTER; and JOE TAFT, an individual.
Docket Nos. 15-0160, 15-0161.
Miscellaneous Order.
Filed May 27, 2016.

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interlocutory appeal of an administrative law judge's ruling denying the respondent's motion to dismiss).

In re: GRETCHEN MOGENSEN.
Docket No. 16-0042.
Miscellaneous Order.
Filed June 15, 2016.

In re: STEPHANIE TAUNTON, an individual d/b/a BOW WOW PRODUCTIONS and HISPERIA ZOO.
Docket No. 14-0157.
Miscellaneous Order.
Filed June 23, 2016.

In re: THE UNIVERSITY OF LOUISIANA AT LAFAYETTE, a public educational institution d/b/a NEW IBERIA RESEARCH CENTER.
Docket No. 15-0086.
Miscellaneous Order.
Filed June 23, 2016.

CIVIL RIGHTS

In re: CARL PARKER.
Docket No. 16-0065.
Order Dismissing Complaint.
Filed March 22, 2016.

FEDERAL CROP INSURANCE ACT

In re: ERIC CANNON, TRIPLE C FARMS.
Docket No. 15-0123.
Order Dismissing Complaint.
Filed March 10, 2016.

HORSE PROTECTION ACT

In re: DON RAGAN CRUM, d/b/a DON CRUM STABLES; KENDALL CRUM; and STEPHEN RALEY.
Docket Nos. 15-0002, 15-0003, 15-0004.
Miscellaneous Order.
Filed January 15, 2016.

MISCELLANEOUS ORDERS & DISMISSALS

In re: DON RAGAN CRUM, d/b/a DON CRUM STABLES; KENDALL CRUM; and STEPHEN RALEY.
Docket Nos. 15-0002, 15-0003, 15-0004.
Order of Dismissal.
Filed February 22, 2016.

In re: ROCKY ROY McCOY.
Docket No. 16-0026.
Miscellaneous Order.
Filed April 21, 2016.

In re: PAIGE EDWARDS.
Docket No. 14-0008.
Order of Dismissal.
Filed May 23, 2016.

In re: WILLIAM BROCK TILLMAN.
Docket No. 15-0001.
Hearing Cancellation.
Filed May 26, 2016.

In re: HERBERT DERICKSON.
Docket No. 14-0199.
Miscellaneous Order.
Filed June 1, 2016.

In re: HOWARD HAMILTON & PATRICK W. THOMAS.
Docket Nos. 13-0365, 13-0366.
Miscellaneous Order.
Filed June 2, 2016.

In re: TERRY WAYNE SIMS.
Docket No. 15-0150.
Miscellaneous Order.
Filed June 2, 2016.

HPA.

Darlene M. Bolinger, Esq., for Complainant.
Respondent, pro se.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Procedural History

On May 10, 2016, Terry Wayne Sims filed a Petition for Reconsideration requesting that I reconsider *Sims*, HPA Docket No. 15-0150, 2016 WL 2892945 (U.S.D.A. Apr. 29, 2016). On May 26, 2016, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a response to Mr. Sims' Petition for Reconsideration,[1] and on May 27, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Sims' Petition for Reconsideration.

Discussion

The rules of practice applicable to this proceeding[2] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . . .
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall

[1] Reply to Resp't's Pet. for Recons.
[2] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

> be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

Mr. Sims requests that I modify the Order in *Sims*, HPA Docket No. 15-0150, 2016 WL 2892945 (U.S.D.A. Apr. 29, 2016), by eliminating the provision requiring Mr. Sims to pay a $2,200 civil penalty, as follows:

> You alleged that on August 24, 2012, I entered a horse named "The Spooky Spook" in the 74th National Walking Horse Celebration. Three years later, July 29, 2015, you sent Certified Mail stating I had entered a horse that was sore.
>
> I have not shown nor trained horses since that date. I have had no further infractions. Please remove the $2,200 civil penalty you assessed. I will no longer train or show horses. Thank you for your consideration.

Pet. for Recons. Mr. Sims does not assert an error of law, an error of fact, an intervening change in controlling law, or unusual circumstances as the basis for his request. Therefore, I reject Mr. Sims' request that I modify the Order in *Sims*, HPA Docket No. 15-0150, 2016 WL 2892945 (U.S.D.A. Apr. 29, 2016).

Pursuant to the Rules of Practice, the decision of the Judicial Officer is automatically stayed pending the determination to grant or deny a

timely-filed petition for reconsideration.[3] Mr. Sims's Petition for Reconsideration was timely filed and automatically stayed *Sims*, HPA Docket No. 15-0150, 2016 WL 2892945 (U.S.D.A. Apr. 29, 2016). Therefore, since Mr. Sims' Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *Sims*, HPA Docket No. 15-0150, 2016 WL 2892945 (U.S.D.A. Apr. 29, 2016), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Sims's Petition for Reconsideration, filed May 10, 2016, is denied.

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In re: ROCKY ROY McCOY.
Docket No. 16-0026.
Miscellaneous Order.
Filed June 23, 2016.

HPA – Administrative procedure – Filing deadlines – Petition for reconsideration – Representation by counsel.

Buren W. Kidd, Esq., for Complainant.
David F. Broderick, Esq., and R. Taylor Broderick, Esq., for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

PROCEDURAL HISTORY

On June 14, 2016, Rocky Roy McCoy filed a Petition for Reconsideration of the Decision of the Judicial Officer [Petition for Reconsideration] requesting that I reconsider *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (U.S.D.A. June 2, 2016) (Pet. for Recons. at 3). On June 16, 2016, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Opposition to Respondent's

[3] 7 C.F.R. § 1.146(b).

Petition for Reconsideration of the Decision of the Judicial Officer. On June 17, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. McCoy's Petition for Reconsideration.

DISCUSSION

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer.[2] The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

Mr. McCoy raises five issues in his Petition for Reconsideration. First, Mr. McCoy asserts the Complaint does not advise him that he may represent himself or obtain counsel (Pet. for Recons. at 1).

I agree with Mr. McCoy's assertion that the Complaint does not advise him that he may appear pro se or obtain counsel to represent him. However, Mr. McCoy does not cite any authority, and I cannot locate any authority requiring that a complaint include advice regarding the right of a respondent to appear pro se or to obtain counsel. The Rules of Practice set forth the required contents of a complaint but do not require that a complaint contain advice regarding the right of a respondent to appear pro se or to obtain counsel, as follows:

> **§ 1.135 Contents of complaint or petition for review.**
>
> (a) *Complaint.* A complaint filed pursuant to § 1.133(b) shall state briefly

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].
[2] 7 C.F.R. § 1.146(a)(3).

> and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

7 C.F.R. § 1.135(a). Therefore, I reject Mr. McCoy's contention that the Complaint is not adequate because it does not include advice regarding Mr. McCoy's right to appear pro se or to obtain counsel.

Moreover, I note that on February 12, 2016, when the Hearing Clerk served Mr. McCoy with the Complaint,[3] the Hearing Clerk also served Mr. McCoy with the Rules of Practice and the Hearing Clerk's service letter, dated December 11, 2015. The Rules of Practice provide that the parties may appear in person or by attorney of record,[4] and the Hearing Clerk's December 11, 2015, service letter informs Mr. McCoy that he may represent himself or obtain legal counsel.

Second, Mr. McCoy contends I erroneously found the objections raised in his April 6, 2016, Memorandum of Law in Support of Respondent's Response and Objection to Motion for Adoption of Proposed Decision and Order [Memorandum of Law] were not timely filed. Mr. McCoy asserts he timely filed an objection to the Administrator's Motion for Adoption of Proposed Decision and Order [Motion for Default Decision] on April 5, 2016, and his April 6, 2016, Memorandum of Law merely supplements that April 5, 2016, objection (Pet. for Recons. at 2).

The record establishes Mr. McCoy was required to file objections to the Administrator's Motion for Default Decision no later than April 5, 2016.[5] Mr. McCoy filed a timely objection to the Administrator's

[3] United States Postal Service Domestic Return Receipt for article number XXXX 7732.
[4] 7 C.F.R. § 1.141(c).
[5] The Hearing Clerk served Mr. McCoy with the Administrator's Motion for Default Decision and the Administrator's Proposed Decision and Order Upon Admission of Facts by Reason of Default [Proposed Default Decision] on March 16, 2016 (United States

Motion for Default Decision on March 22, 2016,[6] and, on April 6, 2016, Mr. McCoy filed the Memorandum of Law which contains additional objections to the Administrator's Motion for Default Decision. I find nothing in the record indicating that Mr. McCoy filed an objection to the Administrator's Motion for Default Decision on April 5, 2016, as Mr. McCoy contends. Therefore, I reject Mr. McCoy's contention that the April 6, 2016 Memorandum of Law was timely filed because it merely supplements an April 5, 2016, objection to the Administrator's Motion for Default Decision.[7]

Third, Mr. McCoy contends I erroneously disregarded Administrative Law Judge Jill S. Clifton's [ALJ] finding that Mr. McCoy's late-filed response to the Complaint[8] did not prejudice the Administrator (Pet. for Recons. at 2).

The ALJ found the Administrator was not prejudiced by Mr. McCoy's late-filed response to the Complaint and cited this lack of prejudice as a basis for denial of the Administrator's Motion for Default Decision.[9] I did not disregard the ALJ's finding, as Mr. McCoy contends. Instead, I considered the lack of prejudice to the Administrator but stated I have long held the lack of prejudice to the complainant is not a basis for denying the complainant's motion for a default decision.[10] I

Postal Service Domestic Return Receipt for article number XXXX 7886); therefore, pursuant to 7 C.F.R. § 1.139, Mr. McCoy was required to file objections to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision no later than April 5, 2016.

[6] As discussed in *McCoy*, No. 16-0026, 2016 WL 3434032, at *3 (U.S.D.A. June 2, 2016), Mr. McCoy's March 22, 2016, objection to the Administrator's Motion for Default Decision has no merit.

[7] Even if I were to find Mr. McCoy's April 6, 2016 Memorandum of Law timely filed, that finding would not alter the disposition of this proceeding. As discussed in *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032, at *3-5 (U.S.D.A. June 2, 2016), Mr. McCoy's April 6, 2016 Memorandum of Law does not contain meritorious objections to the Administrator's Motion for Default Decision.

[8] The Hearing Clerk served Mr. McCoy with the Complaint on February 12, 2016 (United States Postal Service Domestic Return Receipt for article number XXXX 7732). Pursuant to the Rules of Practice, Mr. McCoy was required to file an answer to the Complaint no later than March 3, 2016 (7 C.F.R. § 1.136(a)). Mr. McCoy filed Respondent's Answer to Complaint on March 22, 2016.

[9] ALJ's Ruling Den. Default J. ¶ 8 at 2.

[10] Heartland Kennels, Inc., 61 Agric. Dec. 492, 538-39 (U.S.D.A. 2002) (stating, even if I were to find the complainant would not be prejudiced by setting aside the chief

found nothing in the record indicating that I should deviate from the usual practice of rejecting lack of prejudice to the complainant as a basis for denying the complainant's motion for a default decision.[11] Therefore, I reject Mr. McCoy's contention that I disregarded the ALJ's finding that Mr. McCoy's late-filed response to the Complaint did not prejudice the Administrator.

Fourth, Mr. McCoy contends I erroneously failed to defer to the ALJ's finding that financial difficulties prevented Mr. McCoy from immediately procuring counsel to represent him in this proceeding (Pet. for Recons. at 2).

The ALJ found Mr. McCoy's financial difficulties prevented him from immediately procuring counsel to represent him in this proceeding.[12] Contrary to Mr. McCoy's contention, I deferred to the ALJ's finding, but I concluded Mr. McCoy's financial difficulties are not meritorious reasons for denying the Administrator's Motion for Default Decision, as follows:

> Mr. McCoy could have filed an answer pro se or requested an extension of time within which to file an answer while he resolved the financial difficulties that prevented him from procuring counsel. The Rules of Practice do not require payment of a fee for filing an answer or a request for an extension of time and the cost to a pro se respondent of filing an answer or a request for an extension of time is

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administrative law judge's default decision, that finding would not constitute a basis for setting aside the default decision); Noell, 58 Agric. Dec. 130, 146 (U.S.D.A. 1999) (stating, even if I were to find the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000); Byard, 56 Agric. Dec. 1543, 1561-62 (U.S.D.A. 1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to the complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

[11] McCoy, No. 16-0026, 2016 WL 3434032, at *5 (U.S.D.A. June 2, 2016).

[12] ALJ's Ruling Den. Default J. ¶ 7 at 2.

> negligible. Therefore, I find Mr. McCoy's financial difficulties, which prevented him from procuring counsel immediately after the Hearing Clerk served him with the Complaint, are not meritorious reasons for denying the Administrator's Motion for Default Decision.

McCoy, HPA Docket No. 16-0026, 2016 WL 3434032, at *4 (U.S.D.A. June 2, 2016). Therefore, I reject Mr. McCoy's assertion that I failed to defer to the ALJ's finding that financial difficulties prevented Mr. McCoy from immediately procuring counsel.

Fifth, Mr. McCoy contends allowing the Administrator to file the Complaint two years after Mr. McCoy's alleged violation of the Horse Protection Act and then requiring Mr. McCoy to adhere to the time limits in the Rules of Practice, is inequitable (Pet. for Recons. at 2).

The Rules of Practice do not provide for equitable relief.[13] The Administrator filed the Complaint on December 11, 2015, alleging Mr. McCoy violated the Horse Protection Act on or about March 14, 2014.[14] An action on behalf of the United States in its governmental capacity is not subject to a time limitation absent enactment of a limitation. Mr. McCoy does not direct me to any enactment which establishes a time limitation on the Administrator's institution of an administrative disciplinary proceeding under the Horse Protection Act. Even assuming the statute of limitations in 28 U.S.C. § 2462 applies, this proceeding would not be barred as the Administrator instituted this proceeding one year, eight months, twenty-seven days after Mr. McCoy's alleged Horse Protection Act violation, well within the five-year period set forth in 28 U.S.C. § 2462.

In contrast, Mr. McCoy failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice provide the failure to file an answer within the time prescribed in 7

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[13] Arends, 70 Agric. Dec. 839, 855 (U.S.D.A. 2011); *see also* Hoggan, Agric. Dec. 1812, 1817-19 (U.S.D.A. 1976) (stating neither the administrative law judges nor the Judicial Officer can provide equitable relief under the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders).
[14] Compl. ¶ II at 1.

C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint.[15] Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing.

Pursuant to the Rules of Practice, the decision of the Judicial Officer is automatically stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[16] Mr. McCoy's Petition for Reconsideration was timely filed and automatically stayed *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (U.S.D.A. June 2, 2016). Therefore, since Mr. McCoy's Petition for Reconsideration is denied, I lift the automatic stay, and the Order in *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (U.S.D.A. June 2, 2016), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. McCoy's Petition for Reconsideration, filed June 14, 2016, is denied.

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SALARY OFFSET ACT

In re: LOUISE BALL.
Docket No. 16-0076.
Order to Dismiss Petition.
Filed May 19, 2016.

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[15] 7 C.F.R. § 1.136(c).
[16] 7 C.F.R. § 1.146(b).

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL HEALTH PROTECTION ACT

In re: LORENZO CASTILLO, SR.
Docket No. 16-0008.
Default Decision and Order.
Filed June 15, 2016.

ANIMAL WELFARE ACT

In re: ROMAN D. YODER & LEROY R. YODER.
Docket Nos. 15-00174, 15-0175.
Default Decision and Order.
Filed February 11, 2016.

In re: INDIAN CREEK ENTERPRISES, INC., a Texas corporation.
Docket No. 14-0149.
Default Decision and Order.
Filed March 16, 2016.

In re: THOMAS C. SCHOOLER, an individual.
Docket No. 14-0150.
Default Decision and Order.
Filed March 16, 2016.

In re: KYLE HAY, an individual.
Docket No. 14-0151.
Default Decision and Order.
Filed March 16, 2016.

COMMERCIAL TRANSPORTATION OF EQUINES TO SLAUGHTER ACT

In re: DENNIS V. CHAVEZ, LLC and BERRERA & COMPANY, LLC.
Docket Nos. 16-0080, 16-0081.
Default Decision and Order.
Filed April 27, 2016.

FEDERAL MEAT INSPECTION ACT

In re: JARED L. FRY.
Docket No. 16-0006.
Default Decision and Order.
Filed April 22, 2016.

HORSE PROTECTION ACT

In re: MARVIN NORTH.
Docket No. 15-0074.
Default Decision and Order.
Filed February 17, 2016.

PLANT PROTECTION ACT

In re: FRANCISCO CORTEZ, d/b/a F&C PALLETS, INC.
Docket No. 16-0031.
Default Decision and Order.
Filed April 22, 2016.

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CONSENT DECISIONS

AGRICULTURAL MARKETING ACT

Midamar Corporation; Jalel Aossey; and Yahya Nasser Aossey.
Docket Nos. 16-0059, 16-0060, 16-0061.
Filed February 26, 2016.

ANI MAL WELFARE ACT

Linda Thorp, an individual d/b/a Sky Blue Ranch, Inc., Sky Blue Ranch, SBR Inc. at Sky Ranch, and AIM Pets.
Docket No. 15-0164.
Filed January 5, 2016.

Terry Beal, an individual d/b/a Buffalo Beal's Animal Park.
Docket No. 15-0016.
Filed January 8, 2016.

Big Run Wolf Ranch, Inc.
Docket No. 15-0162.
Filed February 3, 2016.

John F. Bastile.
Docket No. 15-0163.
Filed February 3, 2016.

Claudia Obermiller.
Docket No. 15-0173.
Filed February 3, 2016.

Mary Carpenter.
Docket No. 15-0079.
Filed February 17, 2016.

Burton Sipp, an individual d/b/a Animal Kingdom Zoo.
Docket No. 15-0125.
Filed March 15, 2016.

Animal Kingdom Zoo, Inc., a New Jersey domestic stock corporation.
Docket No. 15-0126.
Filed March 15, 2016.

Barbara Hammen, and individual; Martin Hammen, an individual; and Barbara Hammen Martin Hammen, an Iowa general partnership d/b/a SRK Kennel.
Docket Nos. 15-0157, 15-0158, 15-0159.
Filed March 18, 2016.

Santa Cruz Biotechnology, Inc.
Docket Nos. 12-0536, 15-0023, 15-0165.
Filed May 19, 2016.

Carson & Barnes Circus Company, an Oklahoma corporation d/b/a Carson & Barnes Circus.
Docket No. 15-0103.
Filed May 25, 2016.

FEDERAL CROP INSURANCE ACT

KEC Farms & Kyle Cannon.
Docket Nos. 15-0121, 15-0122.
Filed March 31, 2016.

FEDERAL MEAT INSPECTION ACT

North American Halal Food Industries, Inc. d/b/a Halal Food Processors, d/b/a Iowa Valley Farms; Jalel Aossey; and Yahya Nasser Aossey.
Docket Nos. 16-0056, 16-0057, 16-0058.
Filed February 26, 2016.

Lake's Farm Raised Catfish, Inc. & John H. Lake.
Docket Nos. 16-0066, 16-0067.
Filed March 1, 2016.

CONSENT DECISIONS

Tank's Meat, Inc.; Eric Amstutz; and Kurt Amstutz.
Docket Nos. 16-0087, 16-0088, 16-0089.
Filed March 29, 2016.

Productos Dany, Inc. & Daniel E. Martinez-Garcia.
Docket No. 16-0103.
Filed May 4, 2016.

Mountainair Heritage Meat Processing, Inc.
Docket No. 16-0017.
Filed May 10, 2016.

FLUID MILK PROMOTION ACT

Midland Farms, Inc.
Docket No. 15-0156.
Filed March 3, 2016.

HORSE PROTECTION ACT

Don Ragan Crum, d/b/a Don Crum Stables.
Docket No. 15-0002.
Filed February 22, 2016.

Stephen Raley.
Docket No. 15-0004.
Filed February 22, 2016.

Joshua Clay Mills.
Docket Nos. 12-0602, 12-0640, 12-0642, 12-0644, 13-0029, 14-0089.
Filed March 18, 2016.

Gerald Dan Waddell.
Docket No. 13-0371.
Filed March 24, 2016.

John Allan Callaway, II, d/b/a Allan Callaway Stables.
Docket No. 14-0017.
Filed April 12, 2016.

Sidney Gartrell Blackmon, Jr.
Docket No. 14-0018.
Filed April 12, 2016.

Alex Way.
Docket No. 15-0073.
Filed May 11, 2016.

Mary Elizabeth Davis.
Docket No. 14-0019.
Filed May 17, 2016.

William Brock Tillman.
Docket No. 15-0001.
Filed June 6, 2016.

ORGANIC FOOD PRODUCTIONS ACT

Yorgo Foods, Inc.
Docket No. 16-0001.
Filed April 1, 2016.

PLANT PROTECTION ACT

Beverly Axelsen.
Docket No. 15-0117.
Filed March 3, 2016.

POULTRY PRODUCTS INSPECTION ACT

North American Halal Food Industries, Inc. d/b/a Halal Food Processors, d/b/a Iowa Valley Farms; Jalel Aossey; and Yahya Nasser Aossey.
Docket Nos. 16-0056, 16-0057, 16-0058.
Filed February 26, 2016.

CONSENT DECISIONS

Tank's Meat, Inc.; Eric Amstutz; and Kurt Amstutz.
Docket Nos. 16-0087, 16-0088, 16-0089.
Filed March 29, 2016.

Productos Dany, Inc. & Daniel E. Martinez-Garcia.
Docket No. 16-0104.
Filed May 4, 2016.

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